IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 844

VINCENT R. MANCUSI, Warden of Attica State Prison, Attica, New York,

Petitioner,

against

FRANK DE FORTE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner
80 Centre Street
New York, N. Y. 10013

JAMES L. LEKIN
Attorney for Respondent
Liberty Bank Building
Buffalo, N. Y. 14202

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

INDEX TO APPENDIX

	PAGE
Order to Show Cause	1
Motion for Leave to Proceed in *Forma Pauperis*	3
Affidavit of Frank De Forte	4
Petition for a Writ of Habeas Corpus	6
Exhibit "A"	19
Exhibit "B"	20
Exhibit "C"	21
Exhibit "D"	22
Opinion of District Court	23
Opinion of United States Court of Appeals	30
Order of Reversal	45
Petition for Rehearing In Banc	47
Judgment	48
Letter of Respondent's Counsel to Hon. Irving R. Kaufman	50
Letter of District Attorney, Nassau County, to Hon. Sterry Waterman	55

Order to Show Cause.

United States District Court

FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel FRANK DE FORTE,

Relator,

against

VINCENT R. MANCUSI, as Warden of Attica Prison, Attica, N. Y.,

Respondent.

Upon the verified Petition, the Exhibits attached thereto of Frank DeForte, for the issuance of Writ of Habeas Corpus and sufficient reason appearing therefore, it is

ORDERED, that the Respondent, Vincent R. Mancusi, as Warden of Attica Prison show cause before this Court, at Room of the Courthouse, Federal Building, Rochester, New York, on the day of 1966 at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, why a Writ of Habeas Corpus should not issue herein as prayed for in said petition; and it is further

ORDERED, that the Relator be retained in custody within this district until further order of this Court; and it is further

ORDERED, that service of a copy of this order to show cause, together with a copy of the verified petition and Exhibits attached thereto on the Respondent Vincent R. Mancusi, as Warden of Attica Prison on or before the

day of 1966, or in the alternative, service of the copies of the aforesaid papers and documents on Louis J. Lefkowitz, Esq., Attorney General of the State of New York, and the District Attorney of Nassau County, State of New York, on or before the date hereinbefore set forth be deemed sufficient service.

Dated: New York, New York, March 24th, 1966.

.....,
United States District Judge.

Motion for Leave to Proceed in *Forma Pauperis*.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel FRANK DE FORTE,

Relator,

—*vs*—

VINCENT R. MANCUSI, as Warden of Attica Prison,
Attica, N. Y.,

Respondent.

Appellant, Frank De Forte, moves the court for an order permitting him to proceed in this Court in forma pauperis with his petition for a Writ of Habeas Corpus and appeal from the judgment of the Court of Appeals of the State of New York entered in this cause on December 6, 1962 and January 23, 1963 pursuant to the provisions of Title 28, U.S.C. Section 1915 and Rule 53 of the Rules of this Court and in support thereof attaches the annexed affidavit.

The petition of the relator herein for a Writ of Habeas Corpus is being filed with this motion and affidavit.

Dated: New York, March 24th, 1966.

/s/ FRANK DEFORTE,
Relator Pro Se.,
Box 149,
Attica, New York.

To:

HONORABLE LOUIS J. LEFKOWITZ,
80 Centre Street,
New York 13, New York.

DISTRICT COURT CLERK,
United States District Court,
Western District of New York,
Federal Building,
Rochester, New York.

JOHN O. HENDERSON.

Affidavit of Frank De Forte.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel FRANK DE FORTE,

Relator,

—*vs*—

VINCENT R. MANCUSI, as Warden of Attica Prison, Attica, N. Y.,

Respondent.

STATE OF NEW YORK }
COUNTY OF WYOMING } ss.:
TOWN OF ATTICA }

FRANK DE FORTE, being duly sworn deposes and says:

1. That he is the relator herein; that he is an American Citizen through birth and over the age of 21 and makes this affidavit in support of the application to proceed in forma pauperis.

2. That he was a defendant in a criminal case and was tried in the County Court, Nassau County, State of New York, and was convicted of conspiracy, extortion and coercion when he was sentenced to a term of 3 to 5 years and that he has been serving said sentence imposed on him from in or about January 1963.

3. That the trial of said relator took 3½ months with almost daily sessions with approximately 125 witnesses appearing and written exhibits numbering in excess of 100. That the stenographer's minutes of the record herein consist of approximately 6500 pages.

4. The relator in prosecuting the appeal herein to both the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York, and to the Court of Appeals of the State of New York, leave to the petitioner appellant herein was granted by each of the aforesaid Courts to permit said relator to appeal in forma pauperis.

5. That he is still without sufficient means and is a poor person well within the meaning of the law, unable to pay costs for filing the petition annexed hereto.

6. That a petition for a Writ of Habeas Corpus is being filed simultaneously with this motion and affidavit.

WHEREFORE, relator prays that he may have leave to proceed in this Court on a petition for a Writ of Habeas Corpus in forma pauperis.

FRANK DE FORTE,
Relator Pro. Se.,
Box 149,
Attica, New York.

Sworn to before me this
24th day of March, 1966.

s/ RALPH J. BOTTONE,
Notary Public.

Petition for a Writ of Habeas Corpus.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel FRANK DE FORTE,

Relator,

against

VINCENT R. MANCUSI, as Warden of Attica Prison, Attica, N. Y.,

Respondent.

To: THE HONORABLE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK:

The petition of Frank De Forte, respectfully shows:

1. The petitioner, Frank De Forte, makes application herein for a Writ of Habeas Corpus, in that he is unlawfully detained and restrained of his liberty by Vincent R. Mancusi and is now in the custody of Vincent R. Mancusi, as Warden of Attica Prison at Attica, New York, located within the District for which this Court sits.

2. The cause or pretext of such detention and restraint and the procedural history of the legal efforts by the relator herein to legally overcome such detention and restraint, are as follows:

Relator was an officer of a local Labor Union to wit, Local No. 266 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and was indicted, together with fourteen (14) others, in the County Court, Nassau County, State of New York, and

jointly tried on sixteen (16) counts of Extortion, Attempted Extortion, Conspiracy and Coercion, some of which counts were dismissed by the Trial Court, and others upon which he was acquitted by a jury finding.

Relator was found guilty by a jury of three (3) counts of the indictment, to wit: an alleged criminal conspiracy to monopolize the business of what is commonly known as "Juke Boxes and Game Machines" in violation of Section 340 of the New York General Business Law and of an alleged Extortion (New York Penal Law, Section 850) and Coercion (New York Penal Law, Section 530), on the same facts, in obtaining the sum of $80.95 from one Richard Hohman, as a consequence of his payment of an initiation fee, dues and assessments in said amount in joining and becoming a member of Local No. 266, the aforesaid Local Union of which the relator was an officer.

Relator was sentenced by the Court on June 21, 1960, on the Felony count of Extortion to a term of 3 to 5 years and relator is now in prison serving the term imposed as aforestated. A suspended sentence as to relator was imposed by the Court on the misdemeanor counts of Conspiracy and Coercion.

Relator appealed to the Appellate Division of the New York Supreme Court, Second Judicial Department and said Court unanimously affirmed the judgment of conviction. The opinion of said Court is reported at 16 A. D. 834; 228 N.Y.S. 2d 875, and a copyy thereof is annexed hereto as Exhibit "A".

Leave to appeal to the Court of Appeals of the State of New York was granted by a Judge thereof (Judge Fuld), and an appeal was thereupon taken by relator herein to said Court. The Court of Appeals by a four (4) to three (3) vote affirmed the judgment of the relator. The opinion of said Court is reported at 12 N. Y. 2d 812; 236 N.Y.S. 2d 63; 187 N. E. 2d 130, and a copy hereof is annexed as Exhibit "B".

Relator moved the Court of Appeals for reargument of his appeal and for an amendment of the remittitur, and said motion for reargument was denied and the motion for the amendment of the remittitur was granted. The opinion of said Court on said motions is reported at 12 N. Y. 2d 946; 238 N.Y.S. 2d 521, and a copy thereof is annexed hereto as Exhibit "C".

Relator thereupon petitioned the Supreme Court of the United States for a Writ of Certiorari to the Court of Appeals of the State of New York and by order dated October 14, 1963, the Supreme Court of the United States denied the petition for a Writ of Certiorari, with Mr. Justice Douglas being of the opinion that Certiorari should be granted (11 L. ed 2d 95).

Accordingly, petitioner exhausted all State remedies as required by 28 U.S.C. 2254.

In or about November, 1963, relator petitioned this Court (File #63 Civil 3357) for a Writ of Habeas Corpus on the ground that he had been denied the due process guaranteed him by Amendment Fourteen of the United States Constitution by the actions of the State Court Judge presiding at his trial in keeping a jury in deliberation for over twenty-four (24) consecutive hours without any sleep, respite or rest, after the jury had on two separate occasions during said period of deliberation advised the trial judge in writing that its members were fatigued, at an impasse, and required rest for clear thinking. The late Judge Dawson denied the petition for the writ of habeas corpus which was sought on the coercion of jury question alone and on appeal to the United States Circuit Court of Appeals for the Second Circuit the denial of the writ was affirmed. The opinion of this appellate court is reported at 335 F. 2d 173.

All of the appeals heretofore taken by relator have been taken in forma pauperis.

3. The relator is restrained and imprisoned pursuant to a sentence that is illegal and void in that relator was denied

his constiutional rights guaranteed by the Fourth and Fifth Amendments of the Constitution of the United States when evidence obtained as a result of an illegal search and seizure was offered by the prosecution in evidence at his trial, and over objections by relator's attorney, was admitted by the Trial Court. Further, evidence obtained through illegal wiretap was offered and admitted at the trial, although the trial judge had ruled said wiretap to be illegal and informed defense counsel that it would be excluded. The facts and circumstances under which the denial of the aforesaid constitutional rights arose are as follows:

The trial of relator was held in the County Court, Nassau County, before Hon. Paul J. Widlitz, then a County Judge, and a jury. Books and records of the Local Union of which relator was an officer were seized under the circumstances hereinafter set forth and were introduced in evidence at said trial. Relator contends that the manner in which those books and records were obtained by the prosecution was as a result of an illegal search and seizure in violation of the Constitution, that defense counsel objected to the admission thereof on the specific ground that the books and records were obtained through an illegal search and seizure, but they were nevertheless admitted in evidence.

The prosecution called as a witness a member of the Nassau County Police Department who was second in command of the District Attorney's Squad (4393-94)*, who testified that on May 13, 1959, he visited the offices of Local No. 266 together with two other members of the District Attorneys' Squad (4394). The offices of Local #266 were located in the County, City and State of New York (4450). Upon his arrival at said office, relator DeForte and co-defendant Zundel were present and objected to the removal

* Refers to pages of trial record.

of any books and records of the organization, and stated that the witness had no right to take same. Thus the witness testified (4409):

> Q. They indicated to you by word and substance and they meant that you had no authority to take those papers and they had no right to give them to you? Ans. Yes, sir.

Nevertheless, the prosecution witness at the aforesaid time and place removed from the premises of Local No. 266 all of the voluminous books and records of that local (4412-13).

At the time of the aforesaid search and seizure, admittedly the witness had no warrant or court order (4402), was unaccompanied by any New York City Police Officer or Sheriff (4450) and the apparent authority under which he was allegedly acting was a subpoena issued by the District Attorney, Nassau County, a photostatic copy of which is annexed hereto as Exhibit "D".

An examination of Exhibit "D" hereof indicated that it is a forthwith subpoena directing Local No. 266 to appear before the District Attorney, Nassau County and to produce at that time the various books and records enumerated therein.

Prior to the admission of the evidence seized as aforesaid, defense counsel for the within relator objected that the introduction thereof resulting from the illegal search and seizure would be violative of the constitutional rights of the relator (4396-97). The Trial Court, in permitting the introduction of the evidence thus obtained, stated (4402):

> "It is true the law says that the manner in which the evidence is obtained has no bearing upon the admissability of evidence otherwise competent."

Under the Code of Criminal Procedure of the State of New York (Section 607, 609, 610, 614 and 615-a), the authority of the District Attorney to issue a subpoena is limited to witnesses who are to appear before a Grand Jury and to those who are to appear at the trial in support of an indictment. The foregoing sections further provide that in the service of such subpoena, the peace officer must serve same in his county, city, town or village and that when a subpoena is to be served in another County, the District Attorney is empowered to send such subpoena to the Sheriff of the County in which said witness resides for service.

The New York State courts in interpreting the aforecited sections of the Code of Criminal Procedure have held as follows:

In re Atlas Lathing Corp., 176 Misc. 959, 29 NYS 2d 458, an Assistant Attorney General accompanied by a plain clothes policeman and an investigator appeared at a business office and under the cloak of a subpoena duces tecum demanded and acquired possession of all of the books, papers and documents of that corporation.

Under the above facts, the Court held that in the exercise of his statutory power the Attorney General may require the production of any books and papers which he deems relevant or material to an investigation but that such power, even if properly exercised, may not be invoked to imply a right of seizure; that the Attorney General had no authority to issue a subpoena requiring the "forthwith" production of records; since the papers were not seized as an incident of an arrest or during the execution of a lawful search warrant, the Court stated that there was a virtual raid upon the premises, without color or legal right that may not be condoned irrespective of the laudible zeal of public officials entrusted with the proper adminis-

tration of criminal justice. The Court then stated:

> ". . . that the forcible and compulsory extortion, seizure and retention of a man's private papers accomplished without the benefit of a proper legal process, should not be indirectly sanctioned by permitting evidence procured therefrom to be used as a basis upon which to predicate a criminal charge against him."

It has also been held that where a forhwith subpoena duces tecum to appear before a Grand Jury was served, that "a subpoena duces tecum confers no right to seize the property referred to in the subpoena • • •" (Amalgamated Union Local 224 v. Levine 219 NYS 2d 851).

In the instant case, the subpoena duces tecum (Exhibit "D") which was returnable forthwith was in fact merely an invitation to attend the office of the District Attorney, Nassau County. It was not to compel the attendance of a witness with books and records set forth either before a Grand Jury or at a trial. It is clear that the New York courts have held that there is no authority to issue a forthwith subpoena nor any authority to seize any records upon the service of such subpoena.

In the instant case, it is undisputed that at the time of the seizure of the books and records herein no arrest was made so that the State cannot claim the search and seizure was an incident to such arrest. It was affirmatively established by the testimony of the prosecution's own witness that at the time that he seized the books and records herein he had no search or other warrant nor any Court order and that his sole authority for his search and seizure was the subpoena duces tecum (Exhibit "D"), and that he was not acting within the territorial jurisdiction of Nassau County.

During the trial of the case at issue over one hundred written exhibits were introduced in evidence. The importance to the trial jury in its deiberation of the illegally seized books and records can best be appreciated by the fact that it made a specific request for the delivery to it of "the checks and books of 266 in evidence" and "Homans application in 266". Such request was made after the jury had been deliberating for approximately 18 hours. It is clear that this illegally seized evidence was of import in the jury deliberation.

It is respectfully submitted that by reason of the foregoing, the Constitutional rights guaranteed to relator by the Fourth Amendment were violated.

In the year 1960, the year of the trial of relator's case, the action of the trial court in admitting illegally seized evidence at the trial may be condoned because of the pre-Mapp evidentiary rule (Mapp v. Ohio, 367 U. S. 643), said prior rule being that the fruits of an illegal search and seizure although excluded as evidence in trial in Federal courts (Weeks v. United States, 232 U. S. 383) was not necessarily excluded in State court trials.

While the appeals in the instant case were pending and being heard in the New York State courts, the United States Supreme Court in Mapp held that the Weeks exclusionary rule would be thenceforward binding upon the individual states. In its opinion (Exhibit "A",) on the appeal to it in the instant case, the New York State Appellate Division, Second Judicial Department while tacitly admitting the truth of relator's claim that the search and seizure of the books and records of Local No. 266 was unlawful, reasoned that these relators had no standing to complain because the Union records seized were not "private, personal papers." That Court erred in reasoning that only private personal papers were within the scope of the exclusionary rule. In Jones v. United

States, (362 U. S. 257, 1960), Mr. Justice Frankfurter stated that "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him."

Relator's lawful use of the property, i.e. the union office that was the scene of the unlawful search and seizure is unquestioned. The premises were legally leased from the owner of the building for the conduct of a union office. Relator was a union officer legally in the union office. As aforesaid, no arrest was made at the time of the search and seizure.

Further, there was no probable cause within the knowledge of the District Attorney, Nassau County to cause him to make the search. There were no charges pending at the time of the search, that required buttressing evidence. The charges later filed against relator were entirely conceived and based upon the contents of the illegally seized evidence. The search was completely general and exploratory. It was a flagrant abuse of the power of his office by the District Attorney, Nassau County.

The relator has never been able to gain access to the records taken for any reason whatsoever. The relator De Forte when faced with Federal prosecution, which charges, in so far as said relator is aware, are still pending for non-compliance of provisions of both the Internal Revenue Act and the Landrum-Griffin Labor Act. Upon threats of imprisonment by authorities of both Federal agencies, relator De Forte asked and urged the District Attorney, Nassau County to permit him access to certain papers required to comply with said provisions, but said requests were repeatedly denied even though said relator stated that such denial prevented him from complying with the laws enforced by those agencies and that he might there-

fore be charged with Federal offenses. Relator De Forte was threatened with imprisonment continuously although he made vigorous efforts to obtain the information needed from the records held by the District Attorney and it was not until said relator commenced service of the prison term imposed in the instant case that his harrassment came to an end. Due to this unlawful and illegal practice of the District Attorney, relator De Forte has a dim outlook as to what will transpire upon his completion of the imposed term and his release.

Further, the Local Union was put out of business by the illegal search and seizure. Every scrap and shred of the Local's records were confiscated by the District Attorney and even access to the records of the local union's membership list so as to advise the membership of what had transpired was refused. It must also be pointed out that at no time was the relator or brother officers charged with misappropriation or embezzlement of union funds.

The arbitrary abuse of power by the District Attorney resulting in the deprivation and violation of the Constitutional rights of the relator should not be permitted to stand.

At the time of the hearing on the within application, relator will submit to the Court a memorandum of law detailing the applicable law, passing reference to which has heretofore been made in this petition.

4. The District Attorney, Nassau County in the prosecution of the instant case further violated the Constitutional rights secured by the Fourth and Fifth Amendments by use of wire tap evidence.

The vintage of the wiretap evidence admitted at the trial herein was dated well prior to the commencement of the Nassau County investigation that resulted in the con-

victions herein of realtor. The dates of the wiretap transcripts coincided with the approximate period of time during which the Local Union was being investigated by the McClellan Committee and the Federal Bureau of Investigation. There were no charges of any wrong doing that were brought forward by either of these two bodies upon completion of said investigations.

The Court is respectfully requested to consider the following facts in substantiation of relator's aforesaid allegations, for obviously relator does not have personal knowledge:

1) A comparison of the dates of the transcripts with the dates of the investigation of the Local Union by the Nassau County authorities;

2) No Court order authorizing the questioned wiretap evidence as required by New York State Law was ever produced at relator's trial; and

3) The dates of the transcript *do* coincide with the approximate dates of the Federal investigations of relator's Local Union.

If the wiretap evidence was a product of a Federal investigation, the evidence would be clearly barred from use in a State proceeding (Schwartz v. Texas, 344 U. S. 199). And since there has been no showing by the State of New York that the wiretap evidence was obtained in compliance with the New York State Law, to wit, Code of Criminal Procedure, Sections 813-a, 813-b, an evidentiary hearing is required in accordance with Townsend v. Sain, 372 U. S. 293, to establish the validity of such evidence.

The wiretap question here presented was not thoroughly explored during the trial because of the prejudicial conduct of the trial judge. When the wiretap evidence was

first introduced, defense counsel moved to surpress same. The trial judge recessed the trial for a few days to deliberate the question. He then ruled that said wiretap evidence, so obtained, was against the laws of our land, that the trial court would be a participant in a federal crime if he allowed the evidence to be admitted, that it would not be used and that the defense need not prepare a defense against the suppressed evidence.

Subsequently, the prosecutor introduced the suppressed evidence, from transcripts, in question answer form, despite the Court's earlier ruling, overruling defense counsel's objection to the evidence, with the prosecutor admitting that he was using the fruits of wiretap. The evidence thus submitted was illegal, and the Court's reversal of its ruling without warning to defense, emasculated the defense.

Wiretap evidence introduced herein was illegal, was an invasion of the rights of privacy of a citizen, and was obtained and introduced in violation of the clear mandate of the Constitution.

Relator will submit a memorandum of law on this point as well.

5. By reason of the foregoing, the relator herein submits that he was deprived of his liberty as a result of an illegal search and seizure and the illegal use of wiretap evidence at his trial in violation of his constitutional rights as guaranteed under the Fourth and Fifth Amendments.

It is therefore respectfully submitted that a hearing be held by this Court to determine the validity of all the evidence used at relator's trial.

6. No other application for these Writs has heretofore been made to any other Court or Judge, except that an application was made as set forth on page 3 of this petition on the ground of coercion of the jury by the trial court.

Petition for a Writ of Habeas Corpus.

WHEREFORE, the relator Frank DeForte prays that a Writ of Habeas Corpus issue herein directed to Vincent R. Mancusi, as Warden of Attica Prison, commanding him to produce the body of relator Frank DeForte before this Court at a time and place to be specified in said Writ to the end that this Court may inquire into the cause of the detention of relator and that relator herein be ordered discharged from the detention and restraint aforesaid.

Dated: Attica, New York, March 24th, 1966.

Respectfully submitted,

FRANK DEFORTE,
Relator—pro se.
Box 149,
Attica, New York.

Subscribed and sworn to before me
the day of March 24, 1966.

s/ RALPH J. BOTTONE,
Notary Public.

Exhibit "A".

Supreme Court, Appellate Division,

Second Judicial Department.

People & C. res. v. Joseph DeGrandis, Frank Deforte and Ernest Zundel, def. ap. (and others, def)—Appeal by each of the three named defendants (DeGrandis, DeForte and Zundel) from a judgment of the County Court, Nassau County, entered June 21, 1960, after a jury trial, convicting him of (a) conspiracy to violate section 340 of the General Business Law (Penal Law, sec. 580, Subd. 1); (b) coercion (Penal Law, sec. 530); and (c) extortion (Penal Law, secs. 850, 851), and imposing sentence. As to each defendant, judgment affirmed. Defendants cannot invoke the Fourth Amendment to the United States Constitution with respect to the union records which were received in evidence. Such records were not the defendant's private, personal papers; they were the property of the union. Whatever possession the defendants had of these records were merely in their capacity as representatives of the union, and not in their private or individual capacity (U. S. v. White, 322 U. S. 694; see, also Mapp v. Ohio, 367 U. S. 643, 646-657, 661-665; and Davis v. U. S., 328 U. S. 582, 587, as to the interrelationship between the Fourth and Fifth Amendments, U. S. Const.). We have examined all the other contentions made by the appellants and find them to be untenable.

Exhibit "B".

Court of Appeals
December 6, 1962

"401. People etc. res. v. Joseph DeGrandis, ap.—

Judgments affirmed. No opinion. All concur except Desmond, Ch. J. Fuld and Proessel, JJ., who dissent and vote reverse and to order a new trial upon the ground that keeping the jury in deliberation for over twenty-four consecutive hours without any respite and after they had advised the Court of their fatigue on more than one occasion, constitutes coercion of the jury as matter of law."

Exhibit "C".

Motions DECISION COURT OF APPEALS JANUARY 23, 1963

2 Mo. No. 64

The People &c.,

Respondents,

vs.

Joseph DeGrandis, Frank DeForte and Ernest Zundel,

Appellants.

Motion for reargument denied. Motion for amendment of the remittitur granted, the return of the remittitur requested and, when returned, it will be amended to read, as follows: Upon the appeal herein there was presented and necessarily passed upon the contention of the defend ants that they were denied due process of law under the Fourteenth Amendment of the Constitution of the United States on the ground that the jury had been coerced into a verdict. In respect to this contention, the Court of Appeals held that there was no such denial. Defendants further contended that evidence obtained from union books and records as a result of an alleged illegal search and seizure was in violation of the Fourth and Fifth Amendments of the Constitution. In respect to this contention, the Court of Appeals held that there were no violations of any individual rights guaranteed to the defendants by the Constitution.

Exhibit "D".

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK

To Local 266, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 55 W. 42nd St., New York, N. Y. ..... Greetings:

YOU ARE COMMANDED to appear before the DISTRICT ATTORNEY of the County of Nassau, at the County Court House, in Mineola, in Nassau County, on FORTHWITH as a witness in a criminal action prosecuted by the People of the State of New York against JOHN DOE and that you bring with you and produce, at that time and place aforesaid, the following:

Charter, Constitution, By-Laws Amendments, all Union Contracts, Membership Lists, Receipt Books. Petty Cash Vouchers, Check Books, Check Stubs, Cancelled Checks, Minute Books, Welfare Records, Insurance Policies and any and all other Union records under in connection with Local 266

and for a failure to attend you will be deemed guilty of a Criminal Contempt of Court, and liable to a fine of Two Hundred and Fifty Dollars and imprisonment for thirty days and be punished for a misdemeanor.

Dated at Mineola, in the County of Nassau, the 13th day of May, 1959.

/s/ Manuel W. Levine
MANUEL W. LEVINE
District Attorney of Nassau County

Bring this Subpoena with you and report
at the District Attorney's Office

Opinion of District Court.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

CIVIL 11812

UNITED STATES OF AMERICA ex rel, FRANK DEFORTE,
Relator,

vs.

VINCENT R. MANCUSI, Warden of Attica State Prison,
Respondent.

Relator, co-defendants Joseph DeGrandis and Ernest Zundel, all officers of Local 266 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and twelve other defendants were indicted in Nassau County, New York, for conspiracy (Penal Law § 580), coercion (Penal Law § 530) and extortion (Penal Law §§ 850, 851). The indictment involved alleged monopolization of the juke box industry in metropolitan New York City. Trial was held in the Nassau County Court, and the jury found defendants DeForte, DeGrandis and Zundel guilty, but acquitted the remaining defendants. Subsequently the relator was sentenced to from three to five years' imprisonment. He is presently serving that sentence in Attica State Prison.

Appeals by the relator to the Appellate Division of the Supreme Court[1] and to the New York Court of Appeals[2]

---

[1] *People* v. *DeGrandis*, 16 A. D. 2d 834, 228 N.Y.S. 2d 875 (2d Dep't 1962).

[2] *People* v. *DeGrandis*, 12 N. Y. 2d 812 (1962).

were unsuccessful, and certiorari to the United States Supreme Court was denied.[3] A previous application for a writ of habeas corpus, on other grounds, was denied and that denial affirmed on appeal.[4] It appeals that the relator, with respect to the present issues, has exhausted his available state remedies as required by Title 28 U.S.C. § 2254.

Relator's petition contains two claims (1) that evidence was received against him in the course of trial which had been seized in violation of his Fourth Amendment rights, and (2) that illegal wire-tap evidence was also improperly received. The second claim has been withdrawn. Involved in the first claim is the manner in which certain books and records of Local 266 were obtained.

It appears that these books and records were secured through the issuance, by the District Attorney's office, of a "forthwith" subpoena duces tecum addressed to Local 266.[5] The Local apparently did not surrender its books and records upon service of the subpoena but, without the consent of its officers, the books and records were taken by those serving the subpoena. The Assistant District Attorney, who has appeared in opposition to this application, has not attempted to justify this use of the subpoena.

Initially, the relator concedes that he, as a union officer, can claim no Fifth Amendment privilege with respect to the production of union records. See *United States* v. *White*, 322 U. S. 694 (1944). He notes, however, that the Supreme Court decided *Mapp* v. *Ohio*, 367 U. S. 643 (1961) before his conviction became final and, accordingly, that

---

[3] *De Grandis, et al.* v. *New York*, 375 U. S. 868 (1963).

[4] *DeGrandis* v. *Fay*, 335 F. 2d 173 (2d Cir. 1963).

[5] As to the propriety of a "forthwith" subpoena under New York law, see *Amalgamated Union, Local 224* v. *Levene*, 31 Misc. 2d 416, 219 N.Y.S. 2d 851 (Sup. Ct. 1961) and *In re Atlas Lathing Corp.*, 176 Misc. 959, 29 N.Y.S. 2d 458 (Sup. Ct 1941).

the Fourth Amendment's proscription against unreasonable searches and seizures would apply to his state court trial. See *Linkletter* v. *Walker*, 381 U. S. 618 (1965). Under *Jones* v. *United States*, 362 U. S. 257 (1960), particularly as that decision is interpreted by the Fifth Circuit Court of Appeals in *Henzel* v. *United States*, 296 F. 2d 650 (1961),[6] relator claims that he, as an individual, has standing to challenge the seizure and use of the aforementioned union records in his state court trial.

In *Jones, supra*, the Supreme Court reviewed a narcotics conviction in which the defendant had been denied standing to move to suppress because he neither claimed ownership of the seized articles nor claimed a greater interest in the searched premises than that of an invitee or guest. Speaking in the context of Rule 41(e) of the Federal Rules of Criminal Procedure, the Court, at page 261, observed initially that:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41(e) applies the general principle that a party will not be heard to claim a constitutional protection unless he 'belongs to the class for whose sake the constitutional protection is given.'"

The Court went on to point out that:

> "The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy."

---

[6] See also: *United States* v. *Birrell*, 242 F. Supp. 191, 198-201 (D.C.S.D.N.Y. 1965).

The Court then concluded that:

> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."

However, upon reviewing the tests which the lower federal courts had applied to determine if an individual had demonstrated that he possessed the requisite interest, the Court found those tests to be deficient. In effect, those tests had pinioned a defendant, either requiring that he risk loss of his Fifth Amendment rights or, in saving his defense, encouraging that he perjure himself in order to establish his standing to assert his Fourth Amendment rights.

Finding this dilemma presupposed ". . . requirements of 'standing' we do not find compelling," the Court found that two separate lines of thought effectively sustained Jones' claim of standing. The Court, at page 263, held that where:

> "The same element in this prosecution which has caused a dilemma, i.e., that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged."

Secondly, and here speaking more generally, the Court, at page 267, held:

> ". . . that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him."

In those cases where a Fourth and Fifth Amendment dilemma could occur, i.e., generally those cases involving contraband, the fruits or instrumentalities of a crime and resulting Fifth Amendment problems, the wisdom and fairness of the new guidelines are immediately apparent. Equally apparent, however, is the absence of any such dilemma when corporate or union books and records are involved. See *Wilson* v. *United States,* 221 U. S. 361 (1911) and *United States* v. *White, supra.*

Although no such dilemma was involved, in *Henzel* v. *United States, supra,* the Fifth Circuit Court of Appeals applying and relying upon Jones, concluded that the sole stockholder and president of a corporation, absent when his corporation's records were illegally seized, had standing to challenge the seizure. This result, and the Circuit Court's comment that the corporation's president "had an interest in the property at least as deserving of protection as the interest of the defendant Jones,"[7] in this court's view cannot be reconciled with existing precedents.

Not only do Henzel's holding and the aforementioned comment overlook the absence of the Fourth and Fifth Amendment dilemma to which the Jones' guidelines apply, but its holding and comment ignore the personal nature of Fourth Amendment rights. See *Hale* v. *Henkel,* 201 U. S. 43, 74-77 (1906); *Wilson* v. *United States,* 221 U. S. 361, 374-386 (1911); *Essgee Co.* v. *United States,* 262 U. S. 147, 155-158 (1923); *Mapp* v. *Ohio,* 367 U. S. 643, 655-657 (1961); *Wong Sun* v. *United States,* 371 U. S. 471, 492 (1963); *United States* v. *DeVasto,* 52 F. 2d 26, 29 (2d Cir. 1931); *United States* v. *Antonelli Fireworks Co.,* 155 F. 2d 631, 636 (2d Cir. 1946); *Lagow* v. *United States,* 159 F. 2d 245, 246 (2d Cir. 1946); *United States* v. *Guterma,* 272 F. 2d 344, 346 (2d Cir. 1959); *United States* v. *Fago,* 319

---

[7] *Henzel* v. *United States,* 296 F. 2d 650, 653 (5th Cir. 1961).

F. 2d 791, 792-793 (2d Cir. 1963). That Jones' "on the premises" test is singularly inappropriate when applied to corporate books and records would appear to require little discussion.[8] Envision, for example, a case in which the corporation's janitor was present during an illegal search and seizure but the corporation's vice-president was not.

Accordingly, the court joins in the view of the Third Circuit Court of Appeals in *United States* v. *Grosso,* 358 F. 2d 154, 160-161 (3rd Cir. 1966), to the effect that the Supreme Court, in Jones, confirmed the general rule as to standing and created an exception applicable only to a limited class of cases. Specifically, for the reasons heretofore stated, the court concludes that those cases involving corporate or union books and records do not fall within that class of cases governed by Jones.

The court is convinced, therefore, that *United States* v. *Antonelli Fireworks Co.,* 155 F. 2d 631 (2d Cir. 1946); *Lagow* v. *United States,* 159 F. 2d 245 (2d Cir. 1946); *United States* v. *Guterma,* 272 F. 2d 344 (2d Cir. 1959) and *United States* v. *Fago,* 319 F. 2d 791 (2d Cir. 1963) are controlling authority and, accordingly, finds the relator lacks standing to raise the present objection. The writ is dismissed.

In view of the recent authority contrary to this court's holding, a certificate of probable cause for appeal is granted.

Permission to appeal in forma pauperis is denied with the qualification that the relator may file with the Clerk of the United States District Court, United States Court-

---

[8] The court recognizes, however, that the Supreme Court, in the exercise of its supervisory power over the federal courts, may have reached the same result as did the Fifth Circuit Court of Appeals in Henzel. See *Ker* v. *California,* 374 U. S. 23, 31 (1963); see generally *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 (1920).

house, Buffalo, New York, a notice of appeal without the payment of filing fees.

This denial does not prevent the relator from applying directly to the Court of Appeals for the Second Circuit, United States Courthouse, Foley Square, New York City, for permission to prosecute an appeal in forma pauperis.

So ordered.

Assigned counsel James L. Lekin has devoted much time to this matter with skill and diligence.

/s/ John O. Henderson
JOHN O. HENDERSON
United States District Judge

Dated: November 16th, 1966.

Opinion of United States Court of Appeals.

UNITED STATES COURT OF APPEALS

No. 478—September Term, 1966.

(Argued June 1, 1967 Decided June 28, 1967.)

Docket No. 31112

UNITED STATES OF AMERICA *ex rel.* FRANK DEFORTE,

Appellant,

—v.—

VINCENT R. MANCUSI, Warden of Attica Prison, Attica, New York,

Appellee.

Before:

WATERMAN, SMITH and KAUFMAN,

Circuit Judges.

KAUFMAN, *Circuit Judge:*

The sole issue presented by this appeal is whether the appellant, Frank DeForte, a vice-president of Local 266 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, had "standing" to object to the use against him in a criminal prosecution of

various union books and records that admittedly were illegally seized from the union's office by state officials, over the appellant's protests.

I.

The parties have stipulated to the essential facts which are relatively simple. DeForte, Joseph DeGrandis, and Ernest Zundel, all officers of Local 266, were indicted in Nassau County for conspiracy (N. Y. Penal Law § 580), coercion (N. Y. Penal Law § 530) and extortion (Penal Law §§ 850, 851) in connection with an alleged monopolization of the juke box industry in the New York City metropolitan area. They were charged with organizing the owners of music machines and juke boxes, and exacting tribute from them in the form of what appeared to be legitimate initiation fees, dues and monthly assessments. Prior to trial, the District Attorney's Office of Nassau County issued a subpoena *duces tecum* commanding the local to produce certain books and records. When the union refused to surrender these materials, the state officials who served the subpoena seized the books and records over the protests of DeForte, who was present at the time in the union's office.[1] The search and seizure were conducted despite the absence of a search warrant, and the state has never attempted to justify the behavior of its officials. Indeed, it has admitted the illegality of their acts.

The illegal search produced significant and substantial evidence. The books and records seized consisted, in the main, of the union charter, minutes of Local 266 meetings, the local's bank book, and cancelled checks and stubs. Also taken were applications to join the union by the

[1] We understand that the union's office was one large room in which defendant, as well as others, had their desks.

officers and other prospective members of the local. Appellant, we are told without denial, played a considerable role in the preparation of these materials. Thus, for example, all checks seized were signed by him together with two other officers; he procured and processed the applications of various members; and he made a substantial number of entries in the local's check book, ledger and records. Moreover, it is conceded that appellant was in possession and/or control of the books and records when they were seized from the union's office. That these records were not of little importance to the state's case is revealed by its admission that "most of the books and records of Local 266 which were seized were introduced into evidence."

The trial of appellant and his co-defendants resulted in the conviction of DeForte, DeGrandis and Zundel, and the acquittal of 12 other defendants named in the indictment. Appellant was subsequently sentenced to a term of from 3 to 5 years in prison. Following his conviction, DeForte appealed to the Appellate Division of the Supreme Court, Second Department, and thereafter to the New York Court of Appeals, alleging, among other points, that the search of the union's office and the seizure of its books and records were illegal, and accordingly the evidence should not have been admitted against him at trial. Both appellate courts affirmed the conviction on the ground that he lacked standing to raise this issue because the books and records were not his personal or private papers, but rather were the property of the union. *People* v. *DeGrandis*, 16 A. D. 2d 834, 228 N. Y. S. 2d 875, *aff'd* 12 N. Y. 2d 812, 236 N. Y. S. 2d 63 (1962). Certiorari to the United States Supreme Court was subsequently denied 375 U. S. 868 (1963).

Having exhausted his state remedies, appellant applied for a federal writ of habeas corpus on an alleged "coercion

of the jury'' claim. His application was denied, and that denial was affirmed by this Court.[2] DeForte then filed a second application in the District Court alleging first, that the books and records used against him during the trial had been seized in violation of his Fourth Amendment rights, and second, that illegal wiretap evidence also had been improperly admitted. The latter claim was withdrawn, while the former was never considered on the merits because Judge Henderson's denial was grounded on his belief that DeForte lacked standing to raise this objection. It is from this denial that he appeals.[3]

II.

The quest for a clear solution to the perplexing query as to who may challenge an allegedly unlawful search and seizure has been confounded by thorny problems. For nearly 50 years we followed the precept that while evidence secured by federal officers as the result of an illegal search and seizure could not be used in a federal prosecution, *Weeks* v. *U. S.*, 232 U. S. 383 (1914), not all defendants had standing to challenge this evidence. Then, in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), we were told that the Fourth Amendment right to privacy was guaranteed against state invasion by the Fourteenth Amendment and

---

[2] In his first application, DeForte alleged that he was denied due process because the judge, after delivering 3½ hour charge, kept the jury in deliberations for 24 consecutive hours, although the jury twice advised the court of its fatigue. *DeGrandis* v. *Fay*, 335 F. 2d 173 (2d Cir. 1964). (In the state Court of Appeals, Desmond, *C. J.*, Fuld and Froessel dissented from the affirmance and voted to reverse because they were of the view that this constituted "coercion of the jury as matter of law.")

[3] The District Judge, recognizing that there was recent authority contrary to his holding, granted a certificate of probable cause.

had to be enforced by the same exclusionary rule found in the federal courts.[4] Thus, the states were confronted with this same "standing" problem, and were compelled to apply the rules that had been developed in the federal courts in determining this question. See *U. S. ex rel. Coffey* v. *Fay*, 344 F. 2d 625, 628 (2d Cir. 1965).

In the pre-*Mapp* era, the federal rule seemed to be that in order to have standing to challenge the legality of evidence allegedly obtained in violation of the Fourth Amendment, a defendant must "claim either to have owned or possesed the seized property or to have had a substantial possessory interest in the premises searched." *Jones* v. *U. S.*, 362 U. S. 257, 261 (1960). See generally R. Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 Nw. U. L. Rev. 471-86 (1952). But, some relaxation of this quite stringent standard seemed to be in the making even prior to *Jones*. In *McDonald* v. *U. S.*, 335 U. S. 451, 456 (1948), the Supreme Court held that a defendant had standing to suppress evidence that had been illegally taken from a co-defendant, who had moved successfully to suppress, because "if the property had been returned [to the co-defendant] . . . it would not have been available for use at the trial." But see *Wong Sun* v. *U. S.*, 371 U. S. 471 (1963). And in *U. S.* v. *Jeffers*, 342 U. S. 48 (1951), the Court ruled that a defendant who had stored narcotics in

---

[4] The exclusionary rule of *Mapp* applied to state court convictions that had not become "final" before that decision was rendered. *Linkletter* v. *Walper*, 381 U. S. 618 (1965). Finality in this context means "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before [the] decision in *Mapp* v. *Ohio*." 381 U. S. at 622 n. 5. DeForte's petition for a writ of certiorari was not denied until October 1963, after *Mapp* was decided. He was entitled, therefore, to the benefits of the exclusionary rule if he had standing to challenge the legality of the search and seizure.

a hotel room rented by his two aunts, and to which he had been given the key, had standing to object to an unlawful search and seizure in the aunts' room. The Court added that "to hold that this search and seizure were lawful as to the respondent [because the search did not invade his privacy] would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right." *Id.* at 52. But it was not until *Jones* v. *U. S., supra,* that the Supreme Court attempted to articulate some standards to guide the courts in this difficult area. A careful examination of that case is therefore essential to a proper resolution of the issues now before us.

III.

Jones was arrested by police officers who possessed a warrant to search for narcotics in an apartment belonging to Evans, his friend. Evans had given Jones the use of the apartment, and a key with which he admitted himself on the day of the arrest. Though his home was elsewhere, Jones had a shirt and suit at the apartment, and had slept there "maybe a night." 362 U. S. at 259.

Prior to trial, Jones moved to suppress the narcotics and paraphernalia seized by the officers, claiming that their warrant had been issued without a showing of probable cause. The government challenged defendant's standing to raise this issue on the ground that he failed to allege "ownership" of the seized goods, or an interest in the searched premises greater than that of an "invitee or guest." The District Court and the Court of Appeals adopted this argument which permitted the receipt in evidence of the seized material.

The issue squarely presented to the Supreme Court was whether Jones was a "person aggrieved" within the mean-

ing of Rule 41(e) of the Federal Rules of Criminal Procedure,[5] and accordingly had standing to make a motion to suppress pursuant to that rule. Speaking for a unanimous Court,[6] Justice Frankfurter observed that:

> In order to qualify as a "person aggrieved by an unlawful search and seizure" *one must have been a victim of a search or seizure, one against whom the search was directed,* as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41(e) applies the general principle that a party will not be heard to claim a constitutional protection unless he "belongs to the class for whose sake the constitiutional protection is given." Hatch v. Reardon, 204 U. S. 152, 160. . . .
>
> Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search

---

[5] Rule 41(e) provides in part:

> A person aggrieved by an unlawful searc and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. . . .

As this Court has previously noted, in an opinion by Judge Waterman, "because the rule is . . . rooted in basic constitutional principle, the same test presumably governs standing to suppress evidence in a state prosecution." *U. S. ex rel. Coffey* v. *Fay,* 344 F. 2d at 628.

[6] Mr. Justice Douglas, though concurring in the Court's resolution of the issue of standing, dissented from the majority's finding that there was probable cause for the issuance of the warrant. 362 U. S. at 273.

as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, *that he himself was the victim of an invasion of privacy.*

362 U. S. at 261. (Emphasis added.)

But, Justice Franfurter went on to note that prosecution for certain crimes of possession posed a dilemma. He reasoned that if, in order to establish standing to suppress illegally seized evidence, a defendant were required to allege ownership of the seized contraband or an interest in the premises where it was found, these very allegations might later be used at the trial to establish his guilt. Moreover, if a defendant alleged possession for purposes of establishing standing, and later denied this at trial, he would be faced with a perjury charge.

In order to eschew this quandary, the Court found that "*two separate lines of thought* effectively sustain defendant's standing in this case." 362 U. S. at 263. (Emphasis added.) First, when possession is sufficient to convict a defendant of the crime charged, he need not show an interest in the premises searched or in the property seized in order to have standing to move for suppression. And second, "even were this not a prosecution turning on illicit possession, the legally requisite interest in the premises was here satisfied for it need not be as extensive a property interest as was required by the courts below." *Ibid.*

In connection with the second ground, the Court rejected the technical distinctions which lower courts had borrowed from the law of property and had applied to the issue of standing.[7] Such distinctions were inconsistent with the

---

[7] "While this Court has never passed upon the interest in the searched premises necessary to maintain a motion to suppress, the

(Footnote continued on following page)

protections guaranteed to those charged with crimes. Moreover, "no just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that *anyone legitimately on the premises when a search occurs* may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." 362 U. S. at 267. (Emphasis added.)

Thus, *Jones* dramatically liberalized the standing requirement for challenging the legality of searches and seizures. But while the case informs us as to what is *not* required to confer standing, the Supreme Court has avoided formulating, and perhaps deliberately, any specific rules for determining what *is* required. The Court apparently recognized that sweeping legal pronouncements which are meaningful are difficult to articulate because the individual's right to privacy in the particular case often conflicts with and must be balanced against society's need for

---

(Footnote continued from preceding page)

Government's argument closely follows the prevailing view in the lower courts. They have denied standing to 'guests' and 'invitees' [citing cases] and employees, who though in 'control' or 'occupancy' lacked 'possession [citing cases]. The necessary quantum of interest has been distinguished as being, variously, ownership in or right to possession of the premises' [citing case], the interest of a 'lessee or licensee' [citing case], or of one with 'dominion' [citing cases]. We do not lightly depart from this course of decisions by the lower courts. We are persuaded, however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. Even in the area from which they derive, due consideration has led to the discarding of these distinctions in the homeland of the common law. See Occupiers' Liability Act, 1957, 5 and 6 Eliz. 2, c. 31, carrying out Law Reform Committee, Third Report, Cmd. 9305. Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards." 362 U. S. at 265-66.

efficient and vigorous police protection. It appears that a proper balance can be struck only on a "case-by-case basis." *See* v. *City of Seattle*, 35 U. S. L., Week 4522, 4524 (U. S. June 5, 1967).

IV.

With this background of the law's evolution on "standing," it is appropriate for us to re-examine the facts in this case. While the state insists that the search and seizure were conducted against Local 266, we would be blind to reality if we did not recognize that the action by the state officials was actually "directed" at DeForte. The allegedly improper activities which the state was attempting to curtail could be halted only by prosecuting DeForte and his fellow union officials. Little would have been gained by prosecuting or fining the union alone, or even driving it to extinction, for the guiding culprits would have remained free to conduct their illegal activities through a different proscenium. (Indeed, the union was not even indicted.) That the state recognized this actuality is clearly evidenced by its placing of "monitors" on the local's telephone in order to overhear conversations of the appellant and other individuals operating behind the union facade. In these circumstances we would be myopic not to recognize that appellant was "a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search and seizure directed at someone else." *Jones* v. *U. S.*, 362 U. S. at 261.[8] Com-

[8] In *U. S. ex rel. Coffey* v. *Fay*, *supra*, we held that where stolen jewels had been seized from Coffey's companion, Kingdom "Bill" DeNormand, at the time he and appellant were arrested in the latter's car, the search was "directed against" Coffey. 344 F. 2d at 628-29. In that case, however, the appellant was confronted with the dilemma discussed in *Jones*, since he was being prosecuted for possession of stolen property.

pare *U. S.* v. *Birrell*, 242 F. Supp. 191 (S. D. N. Y. 1965), *motion for reargument granted and decision affirmed*, 243 F. Supp. 36 (S. D. N. Y. 1965), with *U. S.* v. *Re*, 372 F. 2d 641 (2d Cir.), *cert. denied*, 35 U. S. L. Week, 3475 (1967).

But, in the circumstances present here, the admittedly illegal search was not only "directed" at appellant, it also invaded his right of privacy—the basic right the Fourth Amendment is designed to protect. See *Camara* v. *Municipal Court*, 35 U. S. L. Week 4517, 4518 (U. S. June 5, 1967); *Warden* v. *Hayden*, 35 U. S. L. Week 4493, 4495 (U. S. May 29, 1967). While much has been written on the Fourth Amendemnt's guaranty of the individual's right to be secure in his "home," it is now well established that the freedom from unreasonable searches and seizures extends to one's place of business as well. See *Berger* v. *N. Y.*, 35 U. S. L. Week 4649, 4655 (U. S. June 12, 1967); *Go-Bart Importing Co.* v. *U. S.*, 282 U. S. 344 (1931); *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385 (1920). "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *See* v. *City of Seattle*, 35 U. S. L. Week at 4523.

It is undisputed that DeForte was actually present in the union's office at the time of the illegal search and seizure. This office also served as his place of business and in which he spent a considerable part of each day. It appears to us to have been a clear invasion of privacy for the state's officials to have descended upon what was the union's office *de jure*, but DeForte's office *de facto*, and without a warrant and over his vigorous protests to have seized books and records, a substantial portion of which he had prepared and which were in his custody. We do not believe that in these circumsmtances any just interest of the Government in the effective and rigorous enforcement of the criminal law is hampered by recognizing that one situated as DeForte may challenge the legality of a search. See *Jones* v.

U. S., 362 U. S. at 267. Accordingly, he had standing to move for the suppression of the fruit of the illegal search, and the use of these books and records against him at his trial requires that his conviction be set aside.[9]

V.

We note that the cases cited by the state as enunciating a different principle are inapposite or clearly distinguishable. In *U. S.* v. *Bozza*, 365 F. 2d 206 (2d Cir. 1966), for example, the appellants had abandoned possession of a stolen gun to Guzzo, one of the members of the burglary ring. None of the appellants claimed any legitimate interest in the weapon; nor had any of them been present in Guzzo's home when the allegedly illegal search occurred. In those circumstances we denied standing stating that "the values that the Fourth Amendment protects are sufficiently advanced by excluding the results of illegal searches and seizures at the behest of 'victims' *in the broad sense the Supreme Court has given that term* . . . ." *Id.* at 223. (Emphasis added.)

Similarly, in *U. S.* v. *Grannello*, 365 F. 2d 990 (2d Cir. 1966), the papers which appellants were attempting to suppress had not been seized from them; nor had they contributed in any way to their preparation. And in *U. S.* v. *Fago*, 319 F. 2d 791 (2d Cir.), *cert. denied*, 375 U. S. 906

---

[9] The state argues, and appellant readily concedes, that the union could have been compelled to submit its books and records pursuant to a subpoena, and that if these materials had been legally obtained, DeForte's Fifth Amendment right against self-incrimination would not have prevented this evidence from being used against him. See *U. S.* v. *White*, 322 U. S. 694 (1944); *Wilson* v. *U. S.*, 221 U. S. 361 (1911). But, just as a search cannot be justified by the potent evidence it produces, see e.g., *U. S. ex rel. Rogers* v. *Warden*, —— F. 2d —— (2d Cir., June , 1967), so too an unlawful search cannot be justified on the ground that the evidence seized might have been obtained by other and lawful means.

(1963), the corporate records in question had been *lawfully* obtained by the District Attorney of Erie County "for a purpose wholly unrelated to the subsequently initiated federal inquiry," *id.* at 792, and then were turned over to officials of the Internal Revenue Service.

The other cases relied upon by the state (*U. S.* v. *Guterma,* 272 F. 2d 344 (1969); *U. S.* v. *Antonelli Fireworks Co.,* 155 F. 2d 631, *cert. denied,* 329 U. S. 742 (1946); *U. S.* v. *DeVasto,* 52 F. 2d 26, *cert. denied,* 284 U. S. 678 (1931), were decided prior to *Jones,* and are, therefore, precedents of dubious value. More in point, we believe, is *Henzel* v. *U. S.,* 296 F. 2d 650 (5th Cir. 1961), which is in accord with our holding here.[10]

VI

Finally, we observe that our decision is consonant with the rationale of the exclusionary rule which is "to deter—

---

[10] Henzel was the sole shareholder and president of the Chemoil Corporation whose property was searched by a postal inspector without a warrant. The Court of Appeals concluded that it was not decisive of the suppression issue raised that "the property seized and the premises searched in this case were owned by a corporation rather than by an individual. Since a corporation has the same rights as a natural person to be free from illegal searches and seizures, Silverthorne Lumber Co. v. United States, 251 U. S. 385 . . . there is nothing in the corporate status . . . which would prevent appellant from attacking the unlawful search and seizure of the corporation's property." 296 F. 2d at 652. Altough Henzel was not present when the illegal search and seizure occurred, the court found that the search was "directed at" him. The fact that he had prepared much of the material seized and spent the greater part of each day in his office gave him a sufficient interest in the property to have standing. This conclusion would appear to be *a fortiori* in our case where the appellant was actually present when the search occurred. See also *Villano* v. *U. S.,* 310 F. 2d 680 (10th Cir. 1962). But see *U. S.* v. *Grosso,* 358 F. 2d 154 (1966), in which the Third Circuit apparently concluded that the rationale of *Jones* should be limited to those cases in which a dilemma is posed because the defendant has been charged with a possessory crime.

to compel respect for the constitutional guaranty [against unreasonable searches and seizures] in the only effective way—by removing the incentive to disregard it." *Elkins* v. *U. S.*, 364 U. S. 206, 217 (1960). The underlying assumption of the rule is that the incentive for conducting illegal searches and seizures will be largely destroyed if prosecutors are barred from using the fruit in a criminal prosecution. And it is argued that if the incentive is reduced, the police will have less reason to violate the individual's right of privacy.[11]

We have already noted that it would be unwise to use this case as a vehicle for resolving all controversy in this broad area. But we recognize that in the interpretation of opinions, some of the most glaring errors have been made by mehcanical and unreflective application of new or old formulations, and neglect of the differences between cases

---

[11] The fact that such deterrence is achieved at a high price—the suppression of relevant evidence—has led some observers to conclude that the exclusionary rule should be selectively applied by imposing rather strict standards for standing. See, e.g., R. Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 Nw. U. L. Rev. 471 (1952); Comment, *Standing to Suppress Evidence Obtained by Unconstitutional Search and Seizure*, 55 Mich. L. Rev. 567 (1957). At the other end of the spectrum, however, many commentators have argued that the standing requirement should be liberalized, or even abolished so that all evidence obtained as the result of an unreasonable search and seizure would be excluded in criminal prosecutions. See, Note, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. Chi. L. Rev. 342 (1967); F. Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 Ill. L. Rev. 1 (1950); R. Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962 Duke L. J. 319.

Proponents of this latter view argue quite forcefully that since the exclusionary rule seeks to deter illegal conduct by the removal of incentives, its prophylactic effect is diminished whenever the prosecution is allowed to introduce the fruit of an illegal search. California, however, is the only state whose highest court has eliminated the standing requirement. See *People* v. *Martin*, 45 Cal. 2d 755, 290 P. 2d 855 (1955) (Traynor, *J.*). This Court has refused to take such a step. See *U. S.* v. *Bozza*, 365 F. 2d at 223.

leads to unfortunate and unanticipated consequences. Mindful of this, we therefore caution that we have *not* concluded that every shareholder, or employee, or union member has standing to object to the unlawful seizure of his corporation's or union's books and records. And we have *not* held that every officer has standing to require the suppression of such materials. We do decide that the facts presented to us clearly reveal that the admittedly illegal search and seizure were "directed" at appellant, and that his right of privacy was invaded by the unwarranted action of the state officials. In these circumstances we can discern no legitimate reason for denying DeForte standing.[12]

The Court wishes to express its appreciation to assigned counsel, James L. Lekin of Buffalo, New York, for the time and skill which he devoted to this appeal.

Order reversed and case remanded to the District Court for issuance of the writ of habeas corpus.

---

[12] In light of our conclusion, we find it unnecessary to consider appellant's alternate argument that the decision of the Supreme Court in *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385 (1920), also requires us to reverse.

Order of Reversal.

UNITED STATES COURT OF APPEALS,

FOR THE

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of June, one thousand nine hundred and sixty-seven.

Present: HON. STERRY R. WATERMAN,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES ex rel. FRANK DEFORTE,
Relator-Appellant,

v.

VINCENT R. MANCUSI, Warden of Attica State Prison, Attica, New York,
Respondent-Appellee,

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for the issuance of the writ of habeas corpus.

A. DANIEL FUSARO,
Clerk.

Petition for Rehearing In Banc.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. FRANK DE FORTE,

Petitioner-Appellant,

v.

VINCENT R. MANCUSI, Warden of Attica Prison, Attica, New York,

Respondent-Appellee.

Louis J. Lefkowitz, Attorney General of the State of New York, New York, N. Y., for respondent-appellee.

Petition denied.

S. R. W.

J. J. S.

L R. K.

U. S. C. JJ.

AUG 25 1967

Petition for Rehearing In Banc.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. FRANK DE FORTE,

Petitioner-Appellant,

v.

VINCENT R. MANCUSI, Warden of Attica Prison, Attica, New York,

Respondent-Appellee.

Louis J. Lefkowitz, Attorney General of the State of New York, New York, N. Y., for respondent-appellee.

No active circuit judge having requested that a vote be taken on the suggestion that the case be reheard in banc, the same stands denied.

J. EDWARD LUMBARD,
Chief Judge.

25 August 1967.

Judgment.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil 11,812

ORDER

UNITED STATES OF AMERICA ex rel. FRANK DE FORTE,

Relator,

vs.

VINCENT R. MANCUSI, Warden, Attica State Prison,

Respondent.

The above relator having appealed to the United States Court of Appeals for the Second Circuit from the order of this Court filed November 16, 1966, and said appeal having been heard by the United States Court of Appeals for the Second Circuit which, on the 28th day of June, 1967, issued its order reversing the order of the District Court and directing that the action be remanded with instructions that the writ of habeas corpus shall be issued, and said order having been received and filed in the Office of the Clerk of this Court on the 29th day of August, 1967, it is now,

ORDERED, ADJUDGED and DECREED that the order of the United States Court of Appeals for the Second Circuit issued in this matter on the 28th day of June, 1967, and filed in this Court on the 29th day of August, 1967, is hereby made the order of this Court, and it is further

Judgment.

ORDERED, ADJUDGED and DECREED that pending review of the Decision of the United States Court of Appeals for the Second Circuit, relator is immediately enlarged upon his own recognizance from the custody of the New York State Board of Parole. In the event the Decision of the United States Court of Appeals for the Second Circuit is reversed, relator shall be returned to the custody of the New York State Department of Correction for completion of the unexpired portion of his sentence, and it is further

ORDERED, ADJUDGED and DECREED, that in the event the Decision of the Court of Appeals for the Second Circuit is affirmed, or certiorari is denied, or no appeal is taken from the aforesaid Decision within the prescribed time, the relator is discharged unleess the authorities for the State of New York, within a reasonable time, grant the relator a new trial.

JOHN HENDERSON,
United States District Judge.

Dated: September 21, 1967.

Letter of Respondent's Counsel to Hon. Irving R. Kaufman.

SAPERSTON, WILTSE, DUKE, DAY & WILSON
Formerly Saperston, McNaughtan & Saperston
Attorneys at Law
Liberty Bank Building
Buffalo, N. Y. 14202

June 8, 1967

Hon. Irving R. Kaufman
United States Court of Appeals
Second Circuit
United States Court House
Foley Square
New York, New York

Re: U. S. ex rel. DeForte v. Mancusi, Warden
Docket No. 31112, Cal. No. 478

Dear Judge Kaufman:

During the course of oral argument, you requested me to ascertain, to the extent possible without a hearing, the relationship of Frank DeForte to the books and records of Local 266 admitted to be unlawfully seized without a search warrant. Since the date of oral argument on June 1, 1967, Mr. Henry P. DeVine, Assistant District Attorney, and I have conferred extensively as to De Forte's actual preparation and connection with the books and records of Local 266, and we stipulate and agree on the following:

1. The seized books and records for the most part consisted of the union charter; minutes of meetings of Local 266; a bank book of Local 266; slips, check stubs and cancelled checks of Local 266; applications of the officers to join Local 266; applications of prospective members to join Local 266; record books, and mis-

cellaneous papers of Local 266. (pp. 4419-4439 of the Transcript of the Trial, Vol. IX County Court, Nassau County) Examination of the admitted evidence reveals that DeForte was the preparer of much of these same books, records and documents. Some examples are:

a. The checks seized were signed by all three officers of Local 266.

b. DeForte procured applications from various prospective members and processed these applications. For instance, see Exhibit 28 at page 1838 of Transcript; Exhibits 34 and 35 at page 2128 of Transcript; Exhibit 54 at page 2855 of Transcript; Exhibit 61 at page 3045 of Transcript; and Exhibit (?) at page 5547 of Transcript.

c. An application was submitted by DeForte to join Local 266. (page 4420 of Transcript Vol. IX)

2. DeForte made a substantial portion of entries in the check book, records and ledgers of Local 266.

3. DeForte was Vice President of Local 266 at the time of the search and seizure.

4. The seized books and records were kept in the office of Local 266. (pages 4402-4418 of the Transcript of the Trial, Vol. IX, County Court, Nassau County)

5. DeForte was on the premises of Local 266 when the search and seizure occurred and protested the actions of the authorities. (pages 4394, 4410 of the Transcript of the Trial, Vol. IX County Court, Nassau County)

6. DeForte was in possession and/or custody of the books and records when they were seized by the authorities.

7. DeForte spent a considerable amount of time in the office of Local 266.

8. According to the People's brief filed in the New York Supreme Court, Appellate Division, Second Department at page 99, "most of the books and records of Local 266 which were seized were introduced into evidence."

9. Monitors had been placed on the phone of Local 266. Specifically, a conversation between DeForte and Sidney Mishelow, an owner of juke boxes, was monitored from the District Attorney's Office. *People's Brief,* New York Supreme Court, Appellate Division, Second Department, "People v DeGrandis, DeForte and Zundel", at page 24, and referring to the Transcript pages 4328-4334. Furthermore, representatives of the District Attorney's Office made calls to the office of Local 266 which were monitored and recorded. (Page 18 of People's brief, New York Supreme Court, Appellate Division, Second Department, 4307 of Transcript)

10. Local 266 was never indicted or prosecuted.

It is my understanding that Mr. DeVine will respond to my letter in the acquiescence of the foregoing, agreed upon facts by direct communication to the Court.

These facts are more than sufficient to establish DeForte's right to standing under the authority of *Jones v United States,* 362 U. S. 257 (1960) as interpreted by *Henzel* v. *United States,* 296 F. 2d 650 (5th Cir. 1961), and applied in *Henzel and United States v Birrell,* 242 F. Supp. 91 (S.D.N.Y. 1965). The so-called "on the premise" test

established in *Jones* and referred to in *Henzel* is clearly satisfied as DeForte, vice president of Local 266, was legitimately on the premises of Local 266 when the search and seizure occurred, he objected to the actions of the authorities, and he was in possession of the books and records of Local 266 at the time of the search and seizure.

Under the "person aggrieved by an unlawful search and seizure," test, discussed in *Jones, Henzel* and *Birrell* one must have been a "victim of the search and seizure i.e., one against whom the search was directed." Under this test, DeForte equally qualifies for standing and the protection of the 4th Amendment. It is undisputed that De Forte was vice president of Local 266; that he was the preparer of a substantial portion of the books and records seized; that monitors had been placed on the phone of Local 266 to develop information leading to an indictment of DeForte, along with the other officers of the Local, and that in fact, Local 266 was never indicted or prosecuted. In light of these facts, it is unrealistic to say that DeForte was not the victim of the search and seizure, that is, that the search and seizure was not directed at him as well as the other two union officers.

Technical distinctions are no longer valid criteria in assessing the constitutionality of a search and seizure. *Jones* clearly mandated substance over form and *Warden v Harden*, 35 Law Week 4493 May 30, 1967, is the latest affirmance of this doctrine. With this philosophy in mind it seems clear that the court presently possess more than enough facts to render a decision favorable to the petitioner under the authority of *Jones, Henzel,* and *Birrell.* In these latter two decisions, the defendants were not even on the premises when the searches and seizures occurred and yet the courts quickly recognized the necessity, fair-

ness, logic and desirability of granting standing to these defendants to attack the illegal searches and seizures of corporate books and records.

I would be more than willing to assist the Court in any way whatsoever which the Court believes might be helpful.

Respectfully submitted,

for

SAPERSTON, WILTSE, DUKE, DAY & WILSON

JLL:pm
CC: Hon Sterry R. Waterman
Hon. J. Joseph Smith
Henry P. DeVine

Letter of District Attorney, Nassau County, to Hon. Sterry Waterman.

THE OFFICE OF THE DISTRICT ATTORNEY
OF
NASSAU COUNTY
MINEOLA, NEW YORK
Telephone Pioneer 2-1800

June 12, 1967

Hon. Sterry Waterman
Judge
United States Circuit
Court of Appeals
Second Circuit
Federal Court House
Foley Square
New York, New York

Re: United States ex rel DeForte v. Mancusi
Docket No. 31112, Cal. No. 478

Dear Judge Waterman:

Under separate cover a complete copy of the record of the trial has been delivered to the Office of the Clerk, as well as People's Exhibits 99 through 111, consisting of the Union's bank book, deposit slips, check stubs, canceled checks, as well as a number of Union record books and minutes of Union meetings plus the application of De Forte, DeGrandis and Zundel to join Local 266. It will be seen that entries into the Union record books have been made not only by DeForte, but Zundel and DeGrandis as well.

For the reason that DeForte conceded the books and records in question were the books and records of Local 266, he has been denied standing to question their seizure. Had he claimed that some of the books and records were

his personal books and records, then of course, it would be clear that he would have standing to question their seizure and this is so long before the day of Jones (*United States* v. *Lefkowitz* [1932] 285 U. S. 452; *Go-Bart Importing Co.* v. *United States* [1930] 282 U. S. 344).

The emphasis has always been upon the private nature of the papers seized (*Boyd* v. *United States,* 116 U. S. 616; *Amos* v. *United States,* 255 U. S. 313) contrasted with the records of others (*Curcio* v. *United States,* 354 U. S. 118; *Davis* v. *United States,* 328 U. S. 582; *United States* v. *White,* 322 U. S. 694).

Since the argument of the appeal, the matter of *R. Appleton Owen* v. *Robert F. Kennedy* has come to my attention ([1963, U. S.] 11 Led. 2d 18, 84 S. Ct. 12).

It seems that the Attorney General wanted to examine certain Court records in the possession of certain Mississippi Court Clerks or Registrars in relation to an election for a Federal office. Both the District Court and the Circuit Court directed the Clerks and Registrars to make the Court records available. An application was made to Judge Black for a stay which he denied. Hardly more than twelve months after the Jones case Judge Black declared:

> "Our Court has uniformly held that one who is a mere custodian of records cannot invoke the Fourth or Fifth Amendments to resist an order to produce such records. See United States v. White, 322 U. S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542, and cases cited. The motion for stay is accordingly denied."

It would seem that Jones notwithstanding, the rationale of White, supra; Davis, supra; Curcio, supra; and Wilson, supra, has survived.

I had assumed that with Jones it was settled that the essence of the Fourth Amendment was the right of privacy.

Also, that the common law concepts of the right to title, whether one is a guest, invitee, etc., coming down to us from the law of real property, were no longer acceptable standards to determine whether "houses" of defendant had been searched within the meaning of the Fourth if, in the eyes of the law, defendant's property, as distinguished from another, has been seized.

Bennie Joe Hayden's case (The Criminal Law Reporter, Bureau of National Affairs, Inc., Vol. 1, No. 7) would seem to settle for the present that the spirit of the Fourth is indeed the right to privacy; a conclusion not too helpful to DeForte, not only because his home was not invaded within the determination of any prior controlling cases, but for the more important reason that the evidence seized was admittedy the property of Local 266, not the individual officers, or for that matter, Albert Gallo, Joe Gallo, the Cohen brothers or any of the other indicted conspirators who were not officers or employees of Local 266, whether or not they were present by chance in the Union offices when the search and seizure occurred.

The subtle distinction of the common law put to sleep by Jones would hardly justify "kayoing" the legal existence of a corporation or labor union distinct from its officers, stockholders, members or employees where *its* premises and not that of its officers, stockholders, members or employees has been searched and *its* property seized, not that of its officers, stockholders, members or employees so as to provide standing under the Fourth Amendment to one other than the corporation or labor union.

Of course, if defendant, be he an officer, stockholder, member or employee, is charged with a crime the gravamen of which is "possession", be it narcotics (*Jones* v. *United States,* 362 U. S. 257) or liquor (*Connolly* v. *Medalie,* 58 F 2d 629; *United States* v. *Conoscente,* 63 F 2d 811) or union books, the basic injustice of permitting

the government to argue possession for purposes of guilt, then deny it in the case of the search, would cry out for relief. This, we believe, was the nub of the Coffey case (344 F 2d 625).

In Connolly and Conoscente, defendants were denied standing under the Fourth Amendment because they were but a night watchman and a workman. It was unquestioned they had legal right in the premises and were where they had a lawful right to be. Jones, too, was in the apartment of a friend where he had a legal right to be and, as we read the case, it was to correct the injustice of Connolly and Conoscente that Jones was provided with standing.

If the narcotics did not belong to Jones or, for that matter, if the liquor did not belong to Connolly and Conoscente in the eyes of the criminal law, then no problem under the Fourth Amendment would have presented itself. This represents the heart of the District Attorney's position in this case.

I have this date received a letter from counsel for DeFore regarding the Union records and the connection of relator therewith. I believe the statement of fact to be accurate although, of course, I disagree with the legal inferences or conclusions to be drawn therefrom.

Respectfully yours,

WILLIAM CAHN
District Attorney
HENRY P. DEVINE
Assistant District Attorney

c.c. Hon. Irving R. Kaufman
Hon. J. Joseph Smith
James L. Lekin, Esq.

HPD:EKW

SUPREME COURT, U. S.

Office-Supreme Court,
FILED
NOV 21 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 844

VINCENT R. MANCUSI, Warden of Attica State Prison, Attica, New York,

Petitioner,

against

FRANK DE FORTE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner
Office & P. O. Address
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MICHAEL H. RAUCH
Assistant Attorney General
of Counsel

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

TABLE OF CONTENTS

	PAGE
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons for Granting the Writ	6
1. The decision below represents a significant departure from prior decisions of this Court	6
2. There is a conflict among the Circuit Courts of Appeals on an issue of general importance which should be resolved by this Court	11
3. The Court of Appeals erroneously applied a new Fourth Amendment rule retroactively to a final state court judgment of conviction	14
Conclusion	15
Appendix A	16
Appendix B	23
Appendix C	38
Appendix D	40

CASES

Angelet v. Fay, 381 U. S. 643	15
Boyd v. United States, 116 U. S. 616	7
Chapman v. California, 386 U. S. 18	4

PAGE

Cooper's Express, Inc. v. I.C.C., 330 F. 2d 338 (1st Cir.) 12

Davis v. United States, 328 U. S. 582 7

Elbel v. United States, 364 F. 2d 127 (10th Cir.), *cert. denied*, 385 U. S. 1014, *rehearing denied*, 386 U. S. 939 13

Essgee Co. v. United States, 335 U. S. 151 7

Freeman v. United States, 201 A. 2d 22 (D. C. Court of Appeals) 14

Hale v. Henkel, 201 U. S. 43 ..... 6, 12

Henzel v. United States, 296 F. 2d 650 (5th Cir.) .. 5, 13

Hill v. United States, 374 F. 2d 871 (9th Cir.), *cert. denied*, —— U. S. ——, 36 U. S. L. Week 3144 (October 10, 1967, No. 318) 13

Jones v. United States, 362 U. S. 257 .....5, 6, 7, 8, 9, 11, 12, 14, 15

Lagow v. United States, 159 F. 2d 245 (2d Cir.) 11

Linkletter v. Walker, 381 U. S. 618 15

Mapp v. Ohio, 367 U. S. 643 15

Owen v. Kennedy, 11 L. Ed. 2d 18 6

People v. DeGrandis, 16 A. D. 2d 834, 228 N.Y.S. 2d 875 (2d Dept.), *affirmed*, 12 N. Y. 2d 812, 197 N. E. 2d 130, *remittitur amended*, 12 N. Y. 2d 946, 188 N. E. 2d 794, *cert. denied*, 375 U. S. 868 4

Shapiro v. United States, 335 U. S. 1 ..... 7, 12

Taylor v. United States, 296 F. 2d 446 (D. C. Cir.) .. 14

United States v. Blok, 188 F. 2d 1019 (D. C. Cir.) ... 14

United States v. Collins, 349 F. 2d 863 (2d Cir.), *cert. denied*, 383 U. S. 893, *rehearing denied*, 384 U. S. 947 14

United States v. Epstein, 240 F. Supp. 84 (S.D.N.Y.) 12

United States v. Fago, 319 F. 2d 791, *cert. denied*, 375 U. S. 906 12

PAGE

United States v. Goldberg, 330 F. 2d 30 (3d Cir.) .. 12

United States v. Granello, 365 F. 2d 990, *cert. denied*, 386 U. S. 1019 12

United States v. Grosso, 358 F. 2d 154 (3d Cir.), *cert. granted*, 385 U. S. 810, *reargument granted*, 388 U. S. 904 12

United States v. Guterma, 272 F. 2d 344 (2d Cir.) .. 11

United States v. Hopps, 331 F. 2d 332 (4th Cir.), *cert. denied*, 379 U. S. 820 13

United States v. White, 332 U. S. 694 7

Villano v. United States, 310 F. 2d 680 (10th Cir.) .. 13

Warden v. Hayden, 387 U. S. 294 9

Wilson v. United States, 221 U. S. 361 .....6, 10, 11, 12

STATUTES

N. Y. Penal Law § 530 3

N. Y. Penal Law § 580 3

N. Y. Penal Law § 850 3

N. Y. Penal Law § 851 3

U.S.C., Title 28 § 1254(1) 2

U.S.C., Title 28 § 2244(b) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

VINCENT R. MANCUSI, Warden of Attica State Prison, Attica, New York,

Petitioner,

against

FRANK DEFORTE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the Warden of Attica State Prison, Attica, New York, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the case of *United States of America ex rel. Frank DeForte* v. *Mancusi*. The judgment was entered on June 28, 1967 and a timely motion for rehearing or rehearing in banc was denied on August 25, 1967. Subsequent to the initiation of this habeas corpus proceeding in the United States District Court for the Western District of New York, the respondent was released on parole. The final order of the District Court, entered on September 21, 1967, after the return of the mandate of the Court of Appeals, directs that the respondent be enlarged upon his own

recognizance pending any review by this Court. The order further provides that, in the event of reversal, the respondent be returned to state custody to complete the unexpired portion of his sentence, but that otherwise the respondent shall be unconditionally discharged from custody unless, within a reasonable time, the State of New York grants him a new trial.

Citations to Opinions Below

The opinion of the United States District Court for the Western District of New York denying the respondent's application for a writ of habeas corpus is reproduced as Appendix "A" to this petition and is reported at 261 F. Supp. 579. The opinion of the United States Court of Appeals for the Second Circuit reversing the order of the District Court is reproduced as Appendix "B" to this petion and is not yet reported. The orders of the Court of Appeals denying a timely motion for rehearing or rehearing in banc were entered on August 25, 1967 (Appendix "C"). The order of the District Court entered on September 21, 1967, after the reversal by the Court of Appeals, is reproduced as Appendix "D" to this petition.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Does a seizure of labor union records by the police pursuant to a subpoena duces tecum violate the personal rights of a union official to be secure from unreasonable searches and seizures where the records were seized from the union offices and were admittedly not the personal property of the union official and where the union official was not charged with a possessory crime?

Should new rules in Fourth Amendment cases which extend to union or corporate officials standing to object to searches of union or corporate premises and seizures of union or corporate records be enunciated in a federal habeas corpus proceeding challenging a final state court judgment of conviction?

Statement of the Case

The respondent, a vice-president of Local 266 of the Teamsters Union, was indicted, along with two other union officials and twelve other defendants, by a grand jury of the County of Nassau, State of New York, for Conspiracy (N. Y. Penal Law § 580), Coercion (N. Y. Penal Law § 530) and Extortion (N. Y. Penal Law §§ 850 and 851). The essence of the indictment's charges was that the defendants, using the Union Local as a facade and shield, were monopolizing the juke box industry in the metropolitan New York area by organizing the owners of music machines and juke boxes and compelling them to pay tribute in the guise of union initiation fees, dues and monthly assessments.

Prior to the trial, a subpoena duces tecum was issued to Local 266 by the Nassau County District Attorney's office commanding that the union forthwith produce certain of its books and records at the County Courthouse, Mineola, New York. There was no evidentiary hearing in the District Court and no separate motion to suppress or hearing in the state courts, but the facts surrounding the alleged illegal search and seizure are not in dispute.

The subpoena was served upon the union at its offices. The respondent, as a vice-president of the union, had a desk in the one large room which comprised the union office. There were other desks used by other union officials in this room. The respondent was present at the union office when the subpoena was served. The union refused to comply with the subpoena and surrender the books and

records which it called for. The state officials who served the subpoena thereupon, over the protests of certain union officials including the respondent, seized certain union records including the Charter, bank books, deposit slips and checkstubs of the union. The respondent, in his capacity as an official of the local, had participated in the preparation of many of the union records which were seized, but it is conceded by the respondent that none of the items seized were his personal property. It does not appear, and the respondent has never maintained, that the union records were seized either from the respondent's desk in the common room or from any other area in the union office set aside for the exclusive personal use of the respondent. There was no apparent effort by the union to obtain return of any of the seized union records and a substantial portion of them were introduced into evidence at trial.*

The respondent and two of his co-defendants were convicted by verdict of the jury and the respondent was sentenced on June 21, 1960 to state prison for a term of three to five years. The judgment of conviction was affirmed by the Appellate Division of the New York Supreme Court, that Court holding that the defendants could not invoke the Fourth Amendment to the Constitution with respect to the union records since they were not the personal papers and effects of the defendants, who had possession of them merely in a representational rather than a private capacity. *People* v. *DeGrandis, et al.*, 16 A. D. 2d 834, 228 N.Y.S. 2d 875 (2d Dept.). The New York Court of Appeals affirmed without opinion, *People* v. *DeGrandis, et al.*, 12 N. Y. 2d 812, 197 N. E. 2d 130, and amended its remittitur to indi-

---

* Although the Court of Appeals concluded that the mere fact that these records were offered and admitted into evidence demonstrated their importance to the State's case, it is noteworthy that the prosecution argued in the state appellate courts that these items did not prove any facts which were denied or disputed by the defendants in the course of the 6,000 page trial record. *Cf., Chapman* v. *California*, 386 U. S. 18.

cate that it had held that no individual rights of the defendant had been violated by the alleged illegal search and seizure of the union records. 12 N. Y. 2d 946, 188 N. E. 2d 794. This Court denied certiorari on October 14, 1963 (375 U. S. 868).

Thereafter, the respondent sought a federal writ of habeas corpus on the ground of alleged coercion of the jury. The denial of the writ was unanimously affirmed by the Court of Appeals for the Second Circuit (335 F. 2d 173). The respondent, who was represented by the same counsel who prosecuted his state appeals, made no challenge to the seizure of the union records in that proceeding. See, 28 U.S.C. § 2244(b).

However, the respondent then sought another federal writ of habeas corpus, this time on the ground that the Fourth Amendment to the Constitution prohibited the introduction into evidence of the union's books and records which were seized when the union refused to produce them as required by the subpoena. The United States District Court for the Western District of New York (HENDERSON, J.) concluded that the standards enunciated in this Court's decision in *Jones* v. *United States,* 362 U. S. 257, did not apply to non-possessory crimes and would be singularly inappropriate if applied as a constitutional mandate to cases involving corporate or union books and records. Accordingly the District Court held that the respondent's constitutionally protected rights were not violated by the search of the union offices and the seizure of the union records. In reaching this decision the District Court followed a long line of decisions by this Court and by the Court of Appeals for the Second Circuit which emphasize the personal nature of Fourth Amendment rights. The District Court refused to follow the decision of the Court of Appeals for the Fifth Circuit in *Henzel* v. *United States,* 296 F. 2d 650, which reached a contrary result.

On appeal the Court of Appeals for the Second Circuit reversed and directed that the writ of habeas corpus issue. The Court observed that *Jones* v. *United States, supra,* did not formulate any affirmative tests for standing in cases such as this and concluded that decision must be made on a case-by-case basis. The Court of Appeals found that prior decisions of this Court, relied upon by the District Court, which declined to extend Fourth and Fifth Amendment rights in corporate or union records to corporate or union officials, were inapplicable under the circumstances of this case. It held that the respondent was entitled to suppression of the union books and records because the search was "directed at" him and invaded his personal right of privacy since it occurred at his place of business; because he was lawfully on the premises when the search and seizure occurred; and because he had substantially contributed to the preparation of a substantial portion of the books and records that were seized.

Reasons for Granting the Writ

1. The decision below represents a significant departure from prior decisions of this Court.

It has long been settled in this Court that a corporate officer has no constitutional privileges with respect to corporate books and records and accordingly cannot refuse, on grounds of self-incrimination, to produce the books and records of the corporation. *Hale* v. *Henkel,* 201 U. S. 43. Emphasizing that corporate books and records of which a corporate officer is the custodian do not assume the character of private papers of the custodian, the Court has held that a corporate officer has no personal right to resist honoring a subpoena duces tecum commanding that corporate books and records be turned over to duly authorized public officials. *Wilson* v. *United States,* 221 U. S. 361. *Cf., Owen* v. *Kennedy,* 11 L. Ed. 2d 18. The rule is

the same whether the corporate officer attempts to invoke a Fifth Amendment privilege or to claim a violation of his personal Fourth Amendment rights since the application of both amendments in cases involving corporate records is limited to any rights which the corporation may have and does not confer upon corporate officers any personal rights in such records. *Essgee Co.* v. *United States,* 335 U. S. 151; *Shapiro* v. *United States,* 335 U. S. 1. The same rule has been applied with respect to labor unions in *United States* v. *White,* 332 U. S. 694, where this Court held that a union official had no standing to object on constitutional grounds to the compulsory production of union records since none of the records were his own private papers.

The unmistakable impact of these decisions, which recognize the interplay of the Fourth Amendment's "protection of the privacy of the individual, his right to be let alone" and the Fifth Amendment's "protection of the individual against compulsory production of evidence to be used against him", *Davis* v. *United States,* 328 U. S. 582 at page 587, is that corporate or union records are in no sense clothed with a right of privacy or a privilege on behalf of any corporate official. The Court below, nevertheless, concluded that the respondent had a sufficient personal interest in the union records, which were concededly not his property, to confer standing upon him to object to their seizure from the union pursuant to the subpoena. It thus extended the application of the Fourth Amendment far beyond the protection of the "sanctity of a man's home and the privacies of life", *Boyd* v. *United States,* 116 U. S. 616 at page 630, to permit the respondent successfully to assert as a *personal* defense the right of the union to be secure from unreasonable searches and seizures of its (not the respondent's) "papers and effects". This result was achieved by an interpretation of *Jones* v. *United States,* 362 U. S. 257, which goes far beyond both the holding of that case and the clear rationale of that holding.

In *Jones* the defendant was tried for and convicted of possession of narcotics. Prior to trial he moved to suppress narcotics and narcotics paraphernalia on the ground that the warrant pursuant to which this evidence was seized had been issued without probable cause. The defendant did not allege ownership of the seized items and the testimony on the motion to suppress revealed that the evidence was seized from an apartment belonging to a friend of the defendant who had given the defendant his own key and permitted him to use the apartment. The defendant kept some clothing in the apartment, had used his key to gain admission on the day of the search and was in the apartment at the time of the arrest and search. The lower federal courts had held that the defendant lacked standing to suppress the evidence since he had not alleged ownership of the property seized and was at most a guest or invitee in the apartment. This Court held that the defendant did have standing to object to the search and vacated the conviction.

The Court's reasoning began with the assumption that "restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and security of property" and accordingly that anyone objecting to a search must establish "that he himself was the victim of an invasion of privacy", 362 U. S. at page 261. This prerequisite was not eliminated by other language in the *Jones* decision, as the Court below seemed to assume. Quite the contrary, this Court recognized that prosecutions for possessory crimes present a "special problem", 362 U. S. at p. 261, because of the dilemma facing an accused if he must allege ownership or a possessory interest in the property seized in order to make a prima facie showing of standing to object. Thus, the Court held that the necessity for demonstrating an interest in the property seized, "which is ordinarily required when standing is challenged", 362 U. S. at page 263, must, in fairness to the defendant, be dispensed with in cases involving possessory crimes. This, of course, is the ***holding*** of *Jones*.

But the Court went on to observe that, even if *Jones* had not involved a possessory crime, the defendant had established "the legally requisite interest in the premises" 362 U. S. at page 263. And here it is important to emphasize what the Court held and what the Court did *not* hold. The Court rejected prior lower court decisions which had resolved questions of the legally requisite interest in the premises by resorting to distinctions made in the common law of property between "guests", "invitees", "licensees", etc. The Court thus held that if an individual were could not be denied standing solely because his presence could be described by a common law proprietary category of less than an owner. The Court has recently interpreted *Jones* as recognizing that the paramount purpose of the Fourth Amendment is to protect individual privacy rather than property and as discarding common law property concepts in determining whether privacy has been invaded in a given case. *Warden* v. *Hayden*, 387 U. S. 294. However, the Court below extracted from the *Jones* decision the phrase "anyone legitimately on the premises" and, without regard to the context in which that phrase was used, wrongly concluded that mere presence on the premises created a right of privacy and thereby conferred standing. But this Court did *not* hold that simple presence on the premises conferred standing in the absence of *any* personal interest in the premises. Indeed, to read the *Jones* case as so holding would undermine the emphasis elsewhere in the opinion on the necessity for a "legally requisite interest in the premises", 362 U. S. at page 263, in order to have standing.

Moreover, such an interpretation is illogical and unreasonable. The rationale for requiring a legally requisite interest in the premises as a prerequisite to standing to object to a search is that, in order to have standing, an individual must demonstrate that his personal right of privacy was invaded—"that he himself was the victim of an invasion of privacy." 362 U. S. at page 261. Surely the ques-

tion of whether or not an individual has a personal right of privacy in the premises cannot depend, as the Court below seemed to conclude, on whether or not he is actually present when the search occurs. For example, if Jones' right of privacy in the premises was sufficient irrespective of what common law category is used to describe it, his absence at the time of the search could not have diminished his right of privacy in the premises or made the search any less an invasion of that right which is protected by the Fourth Amendment. Similarly, in the case at bar, whatever right of privacy the respondent may have had could not have been changed if, for example, he was at lunch or on a business call somewhere else when the search occurred.

Thus, the emphasis by the Court of Appeals on the respondent's actual presence at the time of the seizure as support for its conclusion that he had standing to object to the seizure is beside the point. The Court below apparently misreads *Jones* as doing away with the necessity of showing any right of privacy in either the property seized or the premises searched and completely fails to analyze or articulate the rationale for or the nature of the respondent union officer's personal right of privacy in either the union records or the union office. Its conclusion disregards the prior decisions of this Court holding that union officials have *no* personal right of privacy in union records and, by an out of context reading of part of the language in *Jones*, provides a Fourth Amendment shelter for criminal activities of persons whose personal privacy is not invaded by the alleged illegal searches.

The Court of Appeals' reliance upon two other factors to reach its conclusion that the respondent had standing reveals an approach that is even more contrary to the decisions of this Court. It held that the respondent's personal privacy was invaded because the search was "directed at" him since the obvious purpose was to prosecute the respondent and not the union. This view was explicitly rejected by this Court in *Wilson* v. *United States*,

221 U. S. at page 385:

> "Nor is it any answer to say that in present case the inquiry before the grand jury was not directed against the corporation itself. The appellant had no greater right to withhold the books by reason of the fact that the corporation was not charged with criminal abuses."

Similarly, the Court of Appeals' conclusion that the respondent's participation in the preparation of the union records gave him a right of privacy in such records is directly contradictory to the decisions of this Court, *supra*, pages 6-7, which have held that a corporate or union officer has no personal right of privacy in corporate or union records, decisions not even mentioned, much less overruled, in *Jones*.

Whether or not the prior decisions of this Court should be rejected is a decision which should be made only by this Court especially since the Court of Appeals' conclusion is one that is not mandated by any decision of this Court, is not supportable by logic and does violence to the language of the Fourth Amendment's prohibition of illegal searches of an individual's "person, houses, papers and effects".

2. There is a conflict among the Circuit Courts of Appeals on an issue of general importance which should be resolved by this Court.

It should be emphasized that the decision of the Court of Appeals is inconsistent with prior decisions of that Court both before and after *Jones* v. *United States*. That Court has heretofore consistently held, following the reasoning of this Court, that a corporate official has no personal privilege or right of privacy in corporate books and records. See, *e.g.*, *Lagow* v. *United States*, 159 F. 2d 245 (2d Cir.); *United States* v. *Guterma*, 272 F. 2d 344 (2d Cir.). This result has obtained even after *Jones* until the present case, the cases in the Second Circuit repeatedly holding that a corporate official's inability to demonstrate that corporate

records were his *personal* property or were seized from premises in which he had a *personal* interest deprived him of standing to challenge the manner in which the records were seized. *United States* v. *Fago*, 319 F. 2d 791 (2d Cir.), *cert. denied*, 375 U. S. 906; *United States* v. *Granello*, 365 F. 2d 990 (2d Cir.), *cert. denied*, 386 U. S. 1019. See also, *United States* v. *Epstein*, 240 F. Supp. 84 (S.D.N.Y.). The decision in the instant case has thus injected considerable uncertainty into the question of standing to object to seizures of corporate books and records even in the Second Circuit and this uncertainty is compounded by the Court of Appeals' apparent decision to resolve such issues on a case-by-case basis without enunciating any generally applicable standards. Moreover, this situation in the Second Circuit is symptomatic of the highly disparate views prevailing among other Circuits in this area:

First Circuit: Fourth Amendment does not prohibit testimony describing fruits of a search by federal agents of desk of office manager who was present and objected on grounds of privacy. *Cooper's Express, Inc.* v. *I.C.C.*, 330 F. 2d 338, relying upon *Hale* v. *Henkel*, 201 U. S. 43; *Wilson* v. *United States*, 221 U. S. 361; and *Shapiro* v. *United States*, 335 U. S. 1, with no mention of *Jones* v. *United States*.

Third Circuit: Since records were not the personal property of the defendant but belonged to various corporations of which the defendant was an officer, the defendant had no standing to object to their admission in evidence. *United States* v. *Goldberg*, 330 F. 2d 30. The decision in *Jones* v. *United States* formulates rules of standing which are applicable only to possessory crimes (dictum). *United States* v. *Grosso*, 358 F. 2d 154, *cert. granted*, 385 U. S. 810, *reargument granted*, 388 U. S. 904.

Fourth Circuit: Since none of the corporate records were unlawfully seized, Fourth Amendment did not require suppression of records of corporation which the de-

fendant advised. *United States* v. *Hopps*, 331 F. 2d 332, *cert. denied*, 379 U. S. 820, which recognizes the conflict between the Fifth Circuit decisions and the Second Circuit decisions prior to the case at bar.

Fifth Circuit: Fourth Amendment requires suppression of corporate records seized from the office of the president and sole shareholder by a postal inspector who was permitted to accompany a deputy sheriff who was executing a general levy on the corporate assets; the defendant corporate president was not on the premises when the search and seizure occurred but he had prepared much of the material and the search was directed at him. *Henzel* v. *United States*, 296 F. 2d 650.

Ninth Circuit: Unlawful seizure of corporate records from home of defendant's sister-in-law did not entitled the defendant, the sole owner of the corporation, to suppression since the papers belonged to the corporation rather than to the defendant, the defendant had no interest in the premises searched and the defendant was not charged with a possessory crime; the victim of the search was the corporation, even though charges had already been filed against the defendant, and the defendant could claim no derivative prejudice. *Hill* v. *United States*, 374 F. 2d 871, *cert. denied*, —— U. S. ——, 36 U. S. L. Week 3144 (October 10, 1967, No. 318), relying upon prior decisions of the Second Circuit.

Tenth Circuit: Defendant employer was entitled to suppression of personal notebooks unlawfully seized from a common desk used by several employees at defendant's place of business since the search was "directed against" the defendant. *Villano* v. *United States*, 310 F. 2d 680, relying upon *Henzel* v. *United States*, *supra*. This decision has been interpreted as repudiating the requirement that a defendant must have some personal proprietary or possessory interest in the place or thing searched or seized. *Elbel* v. *United States*, 364 F. 2d 127, *cert. denied*, 385 U. S. 1014, *rehearing denied*, 386 U. S. 939.

District of Columbia Circuit: No personal rights of the defendant were violated by action of government agents in searching files of the House of Representatives in connection with the defendant's activities in allegedly procuring payments on false pay vouchers. *Taylor* v. *United States,* 296 F. 2d 446. Defendant, a government employee, was the victim of an invasion of privacy when the desk set aside for her exclusive personal use was illegally searched and evidence was seized, *United States* v. *Blok,* 188 F. 2d 1019, but a search of a table which was open for the common use of several employees did not violate the defendant employee's personal right of privacy. *Freeman* v. *United States,* 201 A. 2d 22 (D. C. Court of Appeals). *Cf., United States* v. *Collins,* 349 F. 2d 863 (2d Cir.), *cert. denied,* 383 U. S. 893, *rehearing denied,* 384 U. S. 947.

On the basis of this brief summary, apart from the internal conflict of Second Circuit decisions, it appears in the case at bar that standing probably would be found to exist in the Fifth and Tenth Circuits but not in the First, Third and Ninth Circuits. This Court last addressed itself directly to a Fourth Amendment standing question in 1960 in the *Jones* case. The variety and inconsistency of approaches and results by the various Courts of Appeals in the ensuing seven years has created a situation where the rights of a defendant to object to searches and seizures and the permissible scope of official action in conducting searches and seizures varies according to geographical happenstance. In the interests of securing a uniform interpretation of standing to raise a Fourth Amendment claim as well as to enunciate specific tests for determining what constitutes a sufficient right of privacy to confer standing, the decision of the Court of Appeals should be reviewed by this Court.

3. The Court of Appeals erroneously applied a new Fourth Amendment rule retroactively to a final state court judgment of conviction.

The conclusion of the Court of Appeals is, as we have shown, a significant departure from prior Fourth Amend-

ment rules enunciated by this Court. Indeed, the court below recognized that this Court has never formulated rules of standing which mandate the result in this case. The judgment of conviction in the case at bar became final after *Mapp* v. *Ohio*, 367 U. S. 643, and after *Jones* v. *United States*, 362 U. S. 257, and this Court denied certiorari to review the exact Fourth Amendment claim which the Court of Appeals has now held is a valid claim. The enunciation of new and extensively broadened rules of standing, like any other new Fourth Amendment rules, should not be made on collateral attack so as to apply retroactively to state court judgments of conviction which became final before such rules were formulated. *Angelet* v. *Fay*, 381 U. S. 643. Any such new rules should date from the time of the decision announcing the new rules for the reasons stated in *Linkletter* v. *Walker*, 381 U. S. 618.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York, November 13, 1967.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MICHAEL H. RAUCH
Assistant Attorney General
of Counsel

APPENDIX A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

CIVIL 11812

UNITED STATES OF AMERICA ex rel. FRANK DEFORTE,

Relator,

vs.

VINCENT R. MANCUSI, Warden of Attica State Prison,

Respondent.

Relator, co-defendants Joseph DeGrandis and Ernest Zundel, all officers of Local 266 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and twelve other defendants were indicted in Nassau County, New York, for conspiracy (Penal Law § 580), coercion (Penal Law § 530) and extortion (Penal Law §§ 850, 851). The indictment involved alleged monopolization of the juke box industry in metropolitan New York City. Trial was held in the Nassau County Court, and the jury found defendants DeForte, DeGrandis and Zundel guilty, but acquitted the remaining defendants. Subsequently the relator was sentenced to from three to five years' imprisonment. He is presently serving that sentence in Attica State Prison.

Appeals by the relator to the Appellate Division of the Supreme Court[1] and to the New York Court of Appeals[2]

---

[1] *People* v. *DeGrandis*, 16 A. D. 2d 834, 228 N.Y.S. 2d 875 (2d Dep't 1962).

[2] *People* v. *DeGrandis*, 12 N. Y. 2d 812 (1962).

were unsuccessful, and certiorari to the United States Supreme Court was denied.[3] A previous application for a writ of habeas corpus, on other grounds, was denied and that denial affirmed on appeal.[4] It appears that the relator, with respect to the present issues, has exhausted his available state remedies as required by Title 28 U.S.C. § 2254.

Relator's petition contains two claims (1) that evidence was received against him in the course of trial which had been seized in violation of his Fourth Amendment rights, and (2) that illegal wire-tap evidence was also improperly received. The second claim has been withdrawn. Involved in the first claim is the manner in which certain books and records of Local 266 were obtained.

It appears that these books and records were secured through the issuance, by the District Attorney's office, of a "forthwith" subpoena duces tecum addressed to Local 266.[5] The Local apparently did not surrender its books and records upon service of the subpoena but, without the consent of its officers, the books and records were taken by those serving the subpoena. The Assistant District Attorney, who has appeared in opposition to this application, has not attempted to justify this use of the subpoena.

Initially, the relator concedes that he, as a union officer, can claim no Fifth Amendment privilege with respect to the production of union records. See *United States* v. *White*, 322 U. S. 694 (1944). He notes, however, that the Supreme Court decided *Mapp* v. *Ohio*, 367 U. S. 643 (1961) before his conviction became final and, accordingly, that

---

[3] *DeGrandis, et al.* v. *New York*, 375 U. S. 868 (1963).

[4] *DeGrandis* v. *Fay*, 335 F. 2d 173 (2d Cir. 1963).

[5] As to the propriety of a "forthwith" subpoena under New York law, see *Amalgamated Union, Local 224* v. *Levine*, 31 Misc. 2d 416, 219 N.Y.S. 2d 851 (Sup. Ct. 1961) and *In re Atlas Lathing Corp.*, 176 Misc. 959, 29 N.Y.S. 2d 458 (Sup. Ct. 1941).

the Fourth Amendment's proscription against unreasonable searches and seizures would apply to his state court trial. See *Linkletter* v. *Walker*, 381 U. S. 618 (1965). Under *Jones* v. *United States*, 362 U. S. 257 (1960), particularly as that decision is interpreted by the Fifth Circuit Court of Appeals in *Henzel* v. *United States*, 296 F. 2d 650 (1961),* relator claims that he, as an individual, has standing to challenge the seizure and use of the aforementioned union records in his state court trial.

In *Jones, supra*, the Supreme Court reviewed a narcotics conviction in which the defendant had been denied standing to move to suppress because he neither claimed ownership of the seized articles nor claimed a greater interest in the searched premises than that of an invitee or guest. Speaking in the context of Rule 41(e) of the Federal Rules of Criminal Procedure, the Court, at page 261, observed initially that:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41(e) applies the general principle that a party will not be heard to claim a constitutional protection unless he 'belongs to the class for whose sake the constitutional protection is given.' "

The Court went on to point out that:

> "The exclusion in federal trials of evidence otherwise competent but gathered by federal officials in violation of the Fourth Amendment is a means for making effective the protection of privacy."

---

* See also: *United States* v. *Birrell*, 242 F. Supp. 191, 198-201 (D.C.S.D.N.Y. 1965).

The Court then concluded that:

> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy."

However, upon reviewing the tests which the lower federal courts had applied to determine if an individual had demonstrated that he possessed the requisite interest, the Court found those tests to be deficient. In effect, those tests had pinioned a defendant, either requiring that he risk loss of his Fifth Amendment rights or, in saving his defense, encouraging that he perjure himself in order to establish his standing to assert his Fourth Amendment rights.

Finding this dilemma presupposed ". . . requirements of 'standing' we do not find compelling," the Court found that two separate lines of thought effectively sustained Jones' claim of standing. The Court, at page 263, held that where:

> "The same element in this prosecution which has caused a dilemma, i.e., that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged."

Secondly, and here speaking more generally, the Court, at page 267, held:

> ". . . that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him."

Appendix A.

In those cases where a Fourth and Fifth Amendment dilemma could occur, i.e., generally those cases involving contraband, the fruits or instrumentalities of a crime and resulting Fifth Amendment problems, the wisdom and fairness of the new guidelines are immediately apparent. Equally apparent, however, is the absence of any such dilemma when corporate or union books and records are involved. See *Wilson* v. *United States,* 221 U. S. 361 (1911) and *United States* v. *White, supra.*

Although no such dilemma was involved, in *Henzel* v. *United States, supra,* the Fifth Circuit Court of Appeals applying and relying upon Jones, concluded that the sole stockholder and president of a corporation, absent when his corporation's records were illegally seized, had standing to challenge the seizure. This result, and the Circuit Court's comment that the corporation's president "had an interest in the property at least as deserving of protection as the interest of the defendant Jones,'" in this court's view cannot be reconciled with existing precedents.

Not only do Henzel's holding and the aforementioned comment overlook the absence of the Fourth and Fifth Amendment dilemma to which the Jones' guidelines apply, but its holding and comment ignore the personal nature of Fourth Amendment rights. See *Hale* v. *Henkel,* 201 U. S. 43, 74-77 (1906); *Wilson* v. *United States,* 221 U. S. 361, 374-386 (1911); *Essgee Co.* v. *United States,* 262 U. S. 147, 155-158 (1923); *Mapp* v. *Ohio,* 367 U. S. 643, 655-657 (1961); *Wong Sun* v. *United States,* 371 U. S. 471, 492 (1963); *United States* v. *DeVasto,* 52 F. 2d 26, 29 (2d Cir. 1931); *United States* v. *Antonelli Fireworks Co.,* 155 F. 2d 631, 636 (2d Cir. 1946); *Lagow* v. *United States,* 159 F. 2d 245, 246 (2d Cir. 1946); *United States* v. *Guterma,* 272 F. 2d 344, 346 (2d Cir. 1959); *United States* v. *Fago,* 319

' *Henzel* v. *United States,* 296 F. 2d 650, 653 (5th Cir. 1961).

F. 2d 791, 792-793 (2d Cir. 1963). That Jones' "on the premises" test is singularly inappropriate when applied to corporate books and records would appear to require little discussion.[8] Envision, for example, a case in which the corporation's janitor was present during an illegal search and seizure but the corporation's vice-president was not.

Accordingly, the court joins in the view of the Third Circuit Court of Appeals in *United States* v. *Grosso*, 358 F. 2d 154, 160-161 (3rd Cir. 1966), to the effect that the Supreme Court, in Jones, confirmed the general rule as to standing and created an exception applicable only to a limited class of cases. Specifically, for the reasons heretofore stated, the court concludes that those cases involving corporate or union books and records do not fall within that class of cases governed by Jones.

The court is convinced, therefore, that *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631 (2d Cir. 1946); *Lagow* v. *United States*, 159 F. 2d 245 (2d Cir. 1946); *United States* v. *Guterma*, 272 F. 2d 344 (2d Cir. 1959) and *United States* v. *Fago*, 319 F. 2d 791 (2d Cir. 1963) are controlling authority and, accordingly, finds the relator lacks standing to raise the present objection. The writ is dismissed.

In view of the recent authority contrary to this court's holding, a certificate of probable cause for appeal is granted.

Permission to appeal in forma pauperis is denied with the qualification that the relator may file with the Clerk of the United States District Court, United States Court-

---

[8] The court recognizes, however, that the Supreme Court, in the exercise of its supervisory power over the federal courts, may have reached the same result as did the Fifth Circuit Court of Appeals in Henzel. See *Ker* v. *California*, 374 U. S. 23, 31 (1963); see generally *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920).

house, Buffalo, New York, a notice of appeal without the payment of filing fees.

This denial does not prevent the relator from applying directly to the Court of Appeals for the Second Circuit, United States Courthouse, Foley Square, New York City, for permission to prosecute an appeal in forma pauperis.

So ordered.

Assigned counsel James L. Lekin has devoted much time to this matter with skill and diligence.

/s/ John O. Henderson
JOHN O. HENDERSON
United States District Judge

Dated: November 16th, 1966.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 478—September Term, 1966.

(Argued June 1, 1967 Decided June 28, 1967.)

Docket No. 31112

UNITED STATES OF AMERICA *ex rel.* FRANK DEFORTE,

Appellant,

—v.—

VINCENT R. MANCUSI, Warden of Attica Prison, Attica, New York,

Appellee.

Before:

WATERMAN, SMITH and KAUFMAN,

Circuit Judges.

KAUFMAN, *Circuit Judge:*

The sole issue presented by this appeal is whether the appellant, Frank DeForte, a vice-president of Local 266 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, had "standing" to object to the use against him in a criminal prosecution of

various union books and records that admittedly were illegally seized from the union's office by state officials, over the appellant's protests.

I.

The parties have stipulated to the essential facts which are relatively simple. DeForte, Joseph DeGrandis, and Ernest Zundel, all officers of Local 266, were indicted in Nassau County for conspiracy (N. Y. Penal Law § 580), coercion (N. Y. Penal Law § 530) and extortion (Penal Law §§ 850, 851) in connection with an alleged monopolization of the juke box industry in the New York City metropolitan area. They were charged with organizing the owners of music machines and juke boxes, and exacting tribute from them in the form of what appeared to be legitimate initiation fees, dues and monthly assessments. Prior to trial, the District Attorney's Office of Nassau County issued a subpoena *duces tecum* commanding the local to produce certain books and records. When the union refused to surrender these materials, the state officials who served the subpoena seized the books and records over the protests of DeForte, who was present at the time in the union's office.[1] The search and seizure were conducted despite the absence of a search warrant, and the state has never attempted to justify the behavior of its officials. Indeed, it has admitted the illegality of their acts.

The illegal search produced significant and substantial evidence. The books and records seized consisted, in the main, of the union charter, minutes of Local 266 meetings, the local's bank book, and cancelled checks and stubs. Also taken were applications to join the union by the

---

[1] We understand that the union's office was one large room in which defendant, as well as others, had their desks.

officers and other prospective members of the local. Appellant, we are told without denial, played a considerable role in the preparation of these materials. Thus, for example, all checks seized were signed by him together with two other officers; he procured and processed the applications of various members; and he made a substantial number of entries in the local's check book, ledger and records. Moreover, it is conceded that appellant was in possession and/or control of the books and records when they were seized from the union's office. That these records were not of little importance to the state's case is revealed by its admission that "most of the books and records of Local 266 which were seized were introduced into evidence."

The trial of appellant and his co-defendants resulted in the conviction of DeForte, DeGrandis and Zundel, and the acquittal of 12 other defendants named in the indictment. Appellant was subsequently sentenced to a term of from 3 to 5 years in prison. Following his conviction, DeForte appealed to the Appellate Division of the Supreme Court, Second Department, and thereafter to the New York Court of Appeals, alleging, among other points, that the search of the union's office and the seizure of its books and records were illegal, and accordingly the evidence should not have been admitted against him at trial. Both appellate courts affirmed the conviction on the ground that he lacked standing to raise this issue because the books and records were not his personal or private papers, but rather were the property of the union. *People* v. *DeGrandis*, 16 A. D. 2d 834, 228 N. Y. S. 2d 875, *aff'd*, 12 N. Y. 2d 812, 236 N. Y. S. 2d 63 (1962). Certiorari to the United States Supreme Court was subsequently denied 375 U. S. 868 (1963).

Having exhausted his state remedies, appellant applied for a federal writ of habeas corpus on an alleged "coercion

of the jury'' claim. His application was denied, and that denial was affirmed by this Court.[2] DeForte then filed a second application in the District Court alleging first, that the books and records used against him during the trial had been seized in violation of his Fourth Amendment rights, and second, that illegal wiretap evidence also had been improperly admitted. The latter claim was withdrawn, while the former was never considered on the merits because Judge Henderson's denial was grounded on his belief that DeForte lacked standing to raise this objection. It is from this denial that he appeals.[3]

II.

The quest for a clear solution to the perplexing query as to who may challenge an allegedly unlawful search and seizure has been confounded by thorny problems. For nearly 50 years we followed the precept that while evidence secured by federal officers as the result of an illegal search and seizure could not be used in a federal prosecution, *Weeks* v. *U. S.*, 232 U. S. 383 (1914), not all defendants had standing to challenge this evidence. Then, in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), we were told that the Fourth Amendment right to privacy was guaranteed against state invasion by the Fourteenth Amendment and

---

[2] In his first application, DeForte alleged that he was denied due process because the judge, after delivering a 3½ hour charge, kept the jury in deliberations for 24 consecutive hours, although the jury twice advised the court of its fatigue. *DeGrandis* v. *Fay*, 335 F. 2d 173 (2d Cir. 1964). (In the state Court of Appeals, Desmond, *C.J.*, Fuld and Froessel dissented from the affirmance and voted to reverse because they were of the view that this constituted "coercion of the jury as matter of law.")

[3] The District Judge, recognizing that there was recent authority contrary to his holding, granted a certificate of probable cause.

had to be enforced by the same exclusionary rule found in the federal courts.[4] Thus, the states were confronted with this same "standing" problem, and were compelled to apply the rules that had been developed in the federal courts in determining this question. See *U. S. ex rel. Coffey* v. *Fay*, 344 F. 2d 625, 628 (2d Cir. 1965).

In the pre-*Mapp* era, the federal rule seemed to be that in order to have standing to challenge the legality of evidence allegedly obtained in violation of the Fourth Amendment, a defendant must "claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched." *Jones* v. *U. S.*, 362 U. S. 257, 261 (1960). See generally R. Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 Nw. U. L. Rev. 471-86 (1952). But, some relaxation of this quite stringent standard seemed to be in the making even prior to *Jones*. In *McDonald* v. *U. S.*, 335 U. S. 451, 456 (1948), the Supreme Court held that a defendant had standing to suppress evidence that had been illegally taken from a co-defendant, who had moved unsuccessfully to suppress, because "if the property had been returned [to the co-defendant] . . . it would not have been available for use at the trial." But see *Wong Sun* v. *U. S.*, 371 U. S. 471 (1963). And in *U. S.* v. *Jeffers*, 342 U. S. 48 (1951), the Court ruled that a defendant who had stored narcotics in

---

[4] The exclusionary rule of *Mapp* applied to state court convictions that had not become "final" before that decision was rendered. *Linkletter* v. *Walker*, 381 U. S. 618 (1965). Finality in this context means "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before [the] decision in *Mapp* v. *Ohio*." 381 U. S. at 622 n. 5. DeForte's petition for a writ of certiorari was not denied until October 1963, after *Mapp* was decided. He was entitled, therefore, to the benefits of the exclusionary rule if he had standing to challenge the legality of the search and seizure.

a hotel room rented by his two aunts, and to which he had been given the key, had standing to object to an unlawful search and seizure in the aunts' room. The Court added that "to hold that this search and seizure were lawful as to the respondent [because the search did not invade his privacy] would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right." *Id.* at 52. But it was not until *Jones* v. *U. S.*, *supra*, that the Supreme Court attempted to articulate some standards to guide the courts in this difficult area. A careful examination of that case is therefore essential to a proper resolution of the issues now before us.

III.

Jones was arrested by police officers who possessed a warrant to search for narcotics in an apartment belonging to Evans, his friend. Evans had given Jones the use of the apartment, and a key with which he admitted himself on the day of the arrest. Though his home was elsewhere, Jones had a shirt and suit at the apartment, and had slept there "maybe a night." 362 U. S. at 259.

Prior to trial, Jones moved to suppress the narcotics and paraphernalia seized by the officers, claiming that their warrant had been issued without a showing of probable cause. The government challenged defendant's standing to raise this issue on the ground that he failed to allege "ownership" of the seized goods, or an interest in the searched premises greater than that of an "invitee or guest." The District Court and the Court of Appeals adopted this argument which permitted the receipt in evidence of the seized material.

The issue squarely presented to the Supreme Court was whether Jones was a "person aggrieved" within the mean-

ing of Rule 41(e) of the Federal Rules of Criminal Procedure,[5] and accordingly had standing to make a motion to suppress pursuant to that rule. Speaking for a unanimous Court,[6] Justice Frankfurter observed that:

> In order to qualify as a "person aggrieved by an unlawful search and seizure" *one must have been a victim of a search or seizure, one against whom the search was directed,* as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else. Rule 41(e) applies the general principle that a party will not be heard to claim a constitutional protection unless he "belongs to the class for whose sake the constitutional protection is given." Hatch v. Reardon, 204 U. S. 152, 160. . . .
>
> Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search

---

[5] Rule 41(e) provides in part:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. . . .

As this Court has previously noted, in an opinion by Judge Waterman, "because the rule is . . . rooted in basic constitutional principle, the same test presumably governs standing to suppress evidence in a state prosecution." *U. S. ex rel. Coffey* v. *Fay,* 344 F. 2d at 628.

[6] Mr. Justice Douglas, though concurring in the Court's resolution of the issue of standing, dissented from the majority's finding that there was probable cause for the issuance of the warrant. 362 U. S. at 273.

> as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, ***that he himself was the victim of an invasion of privacy.***
>
> 362 U. S. at 261. (Emphasis added.)

But, Justice Frankfurter went on to note that prosecution for certain crimes of possession posed a dilemma. He reasoned that if, in order to establish standing to suppress illegally seized evidence, a defendant were required to allege ownership of the seized contraband or an interest in the premises where it was found, these very allegations might later be used at the trial to establish his guilt. Moreover, if a defendant alleged possession for purposes of establishing standing, and later denied this at trial, he would be faced with a perjury charge.

In order to eschew this quandary, the Court found that "*two separate lines of thought* effectively sustain defendant's standing in this case." 362 U. S. at 263. (Emphasis added.) First, when possession is sufficient to convict a defendant of the crime charged, he need not show an interest in the premises searched or in the property seized in order to have standing to move for suppression. And second, "even were this not a prosecution turning on illicit possession, the legally requisite interest in the premises was here satisfied for it need not be as extensive a property interest as was required by the courts below." *Ibid.*

In connection with the second ground, the Court rejected the technical distinctions which lower courts had borrowed from the law of property and had applied to the issue of standing.[7] Such distinctions were inconsistent with the

---

[7] "While this Court has never passed upon the interest in the searched premises necessary to maintain a motion to suppress, the

(Footnote continued on following page)

protections guaranteed to those charged with crimes. Moreover, "no just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that *anyone legitimately on the premises when a search occurs* may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." 362 U. S. at 267. (Emphasis added.)

Thus, *Jones* dramatically liberalized the standing requirement for challenging the legality of searches and seizures. But while the case informs us as to what is *not* required to confer standing, the Supreme Court has avoided formulating, and perhaps deliberately, any specific rules for determining what *is* required. The Court apparently recognized that sweeping legal pronouncements which are meaningful are difficult to articulate because the individual's right to privacy in the particular case often conflicts with and must be balanced against society's need for

---

(Footnote continued from preceding page)

Government's argument closely follows the prevailing view in the lower courts. They have denied standing to 'guests' and 'invitees' [citing cases] and employees, who though in 'control' or 'occupancy' lacked 'possession' [citing cases]. The necessary quantum of interest has been distinguished as being, variously, 'ownership in or right to possession of the premises' [citing case], the interest of a 'lessee or licensee' [citing case], or of one with 'dominion' [citing cases]. We do not lightly depart from this course of decisions by the lower courts. We are persuaded, however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. Even in the area from which they derive, due consideration has led to the discarding of these distinctions in the homeland of the common law. See Occupiers' Liability Act, 1957, 5 and 6 Eliz. 2, c. 31, carrying out Law Reform Committee, Third Report, Cmd. 9305. Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards." 362 U. S. at 265-66.

efficient and vigorous police protection. It appears that a proper balance can be struck only on a "case-by-case basis." *See* v. *City of Seattle*, 35 U. S. L. Week 4522, 4524 (U. S. June 5, 1967).

IV.

With this background of the law's evolution on "standing," it is appropriate for us to re-examine the facts in this case. While the state insists that the search and seizure were conducted against Local 266, we would be blind to reality if we did not recognize that the action by the state officials was actually "directed" at DeForte. The allegedly improper activities which the state was attempting to curtail could be halted only by prosecuting DeForte and his fellow union officials. Little would have been gained by prosecuting or fining the union alone, or even driving it to extinction, for the guiding culprits would have remained free to conduct their illegal activities through a different proscenium. (Indeed, the union was not even indicted.) That the state recognized this actuality is clearly evidenced by its placing of "monitors" on the local's telephone in order to overhear conversations of the appellant and other individuals operating behind the union facade. In these circumstances we would be myopic not to recognize that appellant was "a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search and seizure directed at someone else." *Jones* v. *U. S.*, 362 U. S. at 261.[8] Com-

---

[8] In *U. S. ex rel. Coffey* v. *Fay, supra*, we held that where stolen jewels had been seized from Coffey's companion, Kingdom "Bill" DeNormand, at the time he and appellant were arrested in the latter's car, the search was "directed against" Coffey. 344 F. 2d at 628-29. In that case, however, the appellant was confronted with the dilemma discussed in *Jones*, since he was being prosecuted for possession of stolen property.

pare *U. S.* v. *Birrell*, 242 F. Supp. 191 (S. D. N. Y. 1965), *motion for reargument granted and decision affirmed*, 243 F. Supp. 36 (S. D. N. Y. 1965), with *U. S.* v. *Re*, 372 F. 2d 641 (2d Cir.), *cert. denied*, 35 U. S. L. Week 3475 (1967).

But, in the circumstances present here, the admittedly illegal search was not only "directed" at appellant, it also invaded his right of privacy—the basic right the Fourth Amendment is designed to protect. See *Camara* v. *Municipal Court*, 35 U. S. L. Week 4517, 4518 (U. S. June 5, 1967); *Warden* v. *Hayden*, 35 U. S. L. Week 4493, 4495 (U. S. May 29, 1967). While much has been written on the Fourth Amendment's guaranty of the individual's right to be secure in his "home," it is now well established that the freedom from unreasonable searches and seizures extends to one's place of business as well. See *Berger* v. *N. Y.*, 35 U. S. L. Week 4649, 4655 (U. S. June 12, 1967); *Go-Bart Importing Co.* v. *U. S.*, 282 U. S. 344 (1931); *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385 (1920). "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *See* v. *City of Seattle*, 35 U. S. L. Week at 4523.

It is undisputed that DeForte was actually present in the union's office at the time of the illegal search and seizure. This office also served as his place of business and in which he spent a considerable part of each day. It appears to us to have been a clear invasion of privacy for the state's officials to have descended upon what was the union's office *de jure*, but DeForte's office *de facto*, and without a warrant and over his vigorous protests to have seized books and records, a substantial portion of which he had prepared and which were in his custody. We do not believe that in these circumstances any just interest of the Government in the effective and rigorous enforcement of the criminal law is hampered by recognizing that one situated as DeForte may challenge the legality of a search. See *Jones* v.

U. S., 362 U. S. at 267. Accordingly, he had standing to move for the suppression of the fruit of the illegal search, and the use of these books and records against him at his trial requires that his conviction be set aside.[9]

V.

We note that the cases cited by the state as enunciating a different principle are inapposite or clearly distinguishable. In *U. S.* v. *Bozza*, 365 F. 2d 206 (2d Cir. 1966), for example, the appellants had abandoned possession of a stolen gun to Guzzo, one of the members of the burglary ring. None of the appellants claimed any legitimate interest in the weapon; nor had any of them been present in Guzzo's home when the allegedly illegal search occurred. In those circumstances we denied standing stating that "the values that the Fourth Amendment protects are sufficiently advanced by excluding the results of illegal searches and seizures at the behest of 'victims' *in the broad sense the Supreme Court has given that term . . . .*" *Id.* at 223. (Emphasis added.)

Similarly, in *U. S.* v. *Grannello*, 365 F. 2d 990 (2d Cir. 1966), the papers which appellants were attempting to suppress had not been seized from them; nor had they contributed in any way to their preparation. And in *U. S.* v. *Fago*, 319 F. 2d 791 (2d Cir.), *cert. denied*, 375 U. S. 906

---

[9] The state argues, and appellant readily concedes, that the union could have been compelled to submit its books and records pursuant to a subpoena, and that if these materials had been legally obtained, DeForte's Fifth Amendment right against self-incrimination would not have prevented this evidence from being used against him. See *U. S.* v. *White*, 322 U. S. 694 (1944); *Wilson* v. *U. S.*, 221 U. S. 361 (1911). But, just as a search cannot be justified by the potent evidence it produces, see, e.g., *U. S. ex rel. Rogers* v. *Warden*, —— F. 2d —— (2d Cir., June , 1967), so too an unlawful search cannot be justified on the ground that the evidence seized might have been obtained by other and lawful means.

(1963), the corporate records in question had been *lawfully* obtained by the District Attorney of Erie County "for a purpose wholly unrelated to the subsequently initiated federal inquiry," *id.* at 792, and then were turned over to officials of the Internal Revenue Service.

The other cases relied upon by the state (*U. S.* v. *Guterma,* 272 F. 2d 344 (1969); *U. S.* v. *Antonelli Fireworks Co.,* 155 F. 2d 631, *cert. denied,* 329 U. S. 742 (1946); *U. S.* v. *DeVasto,* 52 F. 2d 26, *cert. denied,* 284 U. S. 678 (1931)), were decided prior to *Jones,* and are, therefore, precedents of dubious value. More in point, we believe, is *Henzel* v. *U. S.,* 296 F. 2d 650 (5th Cir. 1961), which is in accord with our holding here.[10]

VI

Finally, we observe that our decision is consonant with the rationale of the exclusionary rule which is "to deter—

---

[10] Henzel was the sole shareholder and president of the Chemoil Corporation whose property was searched by a postal inspector without a warrant. The Court of Appeals concluded that it was not decisive of the suppression issue raised that "the property seized and the premises searched in this case were owned by a corporation rather than by an individual. Since a corporation has the same rights as a natural person to be free from illegal searches and seizures, Silverthorne Lumber Co. v. United States, 251 U. S. 385 . . . there is nothing in the corporate status . . . which would prevent appellant from attacking the unlawful search and seizure of the corporation's property." 296 F. 2d at 652. Although Henzel was not present when the illegal search and seizure occurred, the court found that the search was "directed at" him. The fact that he had prepared much of the material seized and spent the greater part of each day in his office gave him a sufficient interest in the property to have standing. This conclusion would appear to be *a fortiori* in our case where the appellant was actually present when the search occurred. See also *Villano* v. *U. S.,* 310 F. 2d 680 (10th Cir. 1962). But see *U. S.* v. *Grosso,* 358 F. 2d 154 (1966), in which the Third Circuit apparently concluded that the rationale of *Jones* should be limited to those cases in which a dilemma is posed because the defendant has been charged with a possessory crime

to compel respect for the constitutional guaranty [against unreasonable searches and seizures] in the only effective way—by removing the incentive to disregard it." *Elkins* v. *U. S.*, 364 U. S. 206, 217 (1960). The underlying assumption of the rule is that the incentive for conducting illegal searches and seizures will be largely destroyed if prosecutors are barred from using the fruit in a criminal prosecution. And it is argued that if the incentive is reduced, the police will have less reason to violate the individual's right of privacy.[11]

We have already noted that it would be unwise to use this case as a vehicle for resolving all controversy in this broad area. But we recognize that in the interpretation of opinions, some of the most glaring errors have been made by mechanical and unreflective application of new or old formulations, and neglect of the differences between cases

---

[11] The fact that such deterrence is achieved at a high price—the suppression of relevant evidence—has led some observers to conclude that the exclusionary rule should be selectively applied by imposing rather strict standards for standing. See, e.g., R. Edwards, *Standing to Suppress Unreasonably Seized Evidence*, 47 Nw. U. L. Rev. 471 (1952); Comment, *Standing to Suppress Evidence Obtained by Unconstitutional Search and Seizure*, 55 Mich. L. Rev. 567 (1957). At the other end of the spectrum, however, many commentators have argued that the standing requirement should be liberalized, or even abolished so that all evidence obtained as the result of an unreasonable search and seizure would be excluded in criminal prosecutions. See, Note, *Standing to Object to an Unreasonable Search and Seizure*, 34 U. Chi. L. Rev. 342 (1967); F. Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 Ill. L. Rev. 1 (1950); R. Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962 Duke L. J. 319.

Proponents of this latter view argue quite forcefully that since the exclusionary rule seeks to deter illegal conduct by the removal of incentives, its prophylactic effect is diminished whenever the prosecution is allowed to introduce the fruit of an illegal search. California, however, is the only state whose highest court has eliminated the standing requirement. See *People* v. *Martin*, 45 Cal. 2d 755, 290 P. 2d 855 (1955) (Traynor, *J.*). This Court has refused to take such a step. See *U. S.* v. *Bozza*, 365 F. 2d at 223.

leads to unfortunate and unanticipated consequences. Mindful of this, we therefore caution that we have *not* concluded that every shareholder, or employee, or union member has standing to object to the unlawful seizure of his corporation's or union's books and records. And we have *not* held that every officer has standing to require the suppression of such materials. We do decide that the facts presented to us clearly reveal that the admittedly illegal search and seizure were "directed" at appellant, and that his right of privacy was invaded by the unwarranted action of the state officials. In these circumstances we can discern no legitmate reason for denying DeForte standing.[12]

The Court wishes to express its appreciation to assigned counsel, James L. Lekin of Buffalo, New York, for the time and skill which he devoted to this appeal.

Order reversed and case remanded to the District Court for issuance of the writ of habeas corpus.

---

[12] In light of our conclusion, we find it unnecessary to consider appellant's alternate argument that the decision of the Supreme Court in *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385 (1920), also requires us to reverse.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. FRANK DE FORTE,

Petitioner-Appellant,

v.

VINCENT R. MANCUSI, Warden of Attica Prison, Attica, New York,

Respondent-Appellee.

PETITION FOR REHEARING

Louis J. Lefkowitz, Attorney General of the State of New York, New York, N. Y., for respondent-appellee.

Petition denied.

S. R. W.

J. J. S.

I. R. K.

U. S. C. JJ.

AUG 25 1967

Appendix C.

UNITED STATES COURT OF APPEALS

For the Second Circuit

United States of America ex rel. Frank De Forte,

Petitioner-Appellant,

v.

Vincent R. Mancusi, Warden of Attica Prison,
Attica, New York,

Respondent-Appellee.

Petition for Rehearing In Banc

Louis J. Lefkowitz, Attorney General
of the State of New York, New York,
N. Y., for respondent-appellee.

No active circuit judge having requested that a vote be taken on the suggestion that the case be reheard in banc, the same stands denied.

J. Edward Lumbard,
Chief Judge

25 August 1967

APPENDIX D

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil 11,812

ORDER

UNITED STATES OF AMERICA ex rel. FRANK DE FORTE

Relator

vs

VINCENT R. MANCUSI, Warden, Attica State Prison

Respondent

The above relator having appealed to the United States Court of Appeals for the Second Circuit from the order of this Court filed November 16, 1966, and said appeal having been heard by the United States Court of Appeals for the Second Circuit which, on the 28th day of June, 1967, issued its order reversing the order of the District Court and directing that the action be remanded with instructions that the writ of habeas corpus shall be issued, and said order having been received and filed in the Office of the Clerk of this Court on the 29th day of August, 1967, it is now,

ORDERED, ADJUDGED and DECREED that the order of the United States Court of Appeals for the Second Circuit issued in this matter on the 28th day of June, 1967, and filed in this Court on the 29th day of August, 1967, is hereby made the order of this Court, and it is further

Appendix D.

ORDERED, ADJUDGED and DECREED that pending review of the Decision of the United States Court of Appeals for the Second Circuit, relator is immediately enlarged upon his own recognizance from the custody of the New York State Board of Parole. In the event the Decision of the United States Court of Appeals for the Second Circuit is reversed, relator shall be returned to the custody of the New York State Department of Correction for completion of the unexpired portion of his sentence, and it is further

ORDERED, ADJUDGED and DECREED, that in the event the Decision of the Court of Appeals for the Second Circuit is affirmed, or certiorari is denied, or no appeal is taken from the aforesaid Decision within the prescribed time, the relator is discharged unless the authorities for the State of New York, within a reasonable time, grant the relator a new trial.

JOHN HENDERSON
United States District Judge

Dated: September 21, 1967

SUPREME COURT U. S.

FILED
JAN 5 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 844

VINCENT R. MANCUSI, Warden of Attica State Prison, Attica, New York,

Petitioner,

against

FRANK DEFORTE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES L. LEKIN,
Attorney for Respondent,
815 Liberty Bank Building,
Buffalo, New York 14202,
'Phone Number: 856-5400,
Area Code 716.

SAPERSTON, WILTSE, DUKE, DAY & WILSON,
of Counsel.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

TABLE OF CONTENTS.

	PAGE
Preliminary Statement	1
Citations to Opinions Below	1
Jurisdiction	1
Statement of the Case	1
Question Presented	1
Reasons for Denying the Writ	2
1. The decision below is not a significant departure from prior decisions of this Court	2
2. There is a conflict among the Circuit Courts of Appeals in the application of *Jones v. United States* relative to standing	5
3. The Court of Appeals correctly applied the rule of standing in a *Habeas Corpus* proceeding	7
Conclusion	7

CASES.

Cooper's Express, Inc. v. I. C. C., 330 F. 2d 338 (1st Cir.)	5
Henzel v. United States, 296 F. 2d 650 (5th Cir.)	6
Hill v. United States, 374 F. 2d 871 (9th Cir.), cert. denied ____ U. S. ____, 36 U. S. L. Week 3144 (October 10, 1967, No. 318)	6
Jones v. United States, 362 U. S. 257	2, 3, 4, 5, 6
Lagow v. United States, 159 F. 2d 245 (2nd Cir.)	5
Linkletter v. Walker, 381 U. S. 618	7
Mapp v. Ohio, 367 U. S. 643	7
Peel v. United States, 316 F. 2d 907 (5th Cir.)	6
United States v. Antonelli Fireworks, 155 F. 2d 631 (2nd Cir.), cert. denied 329 U. S. 742	5
United States *ex rel.* DeForte v. Mancusi, 261 F. Supp. 580 (W. D. N. Y.); reversed and remanded, 379 F. 2d 897 (2nd Cir.)	2

PAGE

United States v. DeVasto, 52 F. 2d 26, cert. denied 284 U. S. 678 5
United States v. Goldberg, 330 F. 2d 30 (3rd Cir.) 5
United States v. Grosso, 358 F. 2d 154; cert. granted 338 U. S. 810 5
United States v. Guterma, 272 F. 2d 344 (2nd Cir.) ... 5
United States v. Hopps, 331 F. 2d 332 (4th Cir.), cert. denied, 379 U. S. 820 6
Villano v. United States, 310 F. 2d 680 (10th Cir.) 6

STATUTES.

Federal Rules of Criminal Procedure Rule 41(e) 2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 844

VINCENT R. MANCUSI, Warden of Attica State Prison, Attica, New York,

Petitioner,

against

FRANK DeFORTE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

Respondent adopts, for the purpose of this memorandum, the material in the Petitioner's petition under the headings "Citations to Opinions Below," with reference to this case being reported at 379 F. 2d 897; "Jurisdiction" and "Statement of the Case."

Question Presented

Whether Respondent, a Vice-President of Local 266 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, had "standing" to object to the use of various Union books and records against him in a criminal prosecution, which were admit-

tedly illegally seized from the Union's office by State officials over Respondent's protest?

Reasons for Denying the Writ

1. The decision below is not a significant departure from prior decisions of this Court.

The issue facing this Court concerns the *right* of a union official to object to the introduction of illegally seized union books and records in a criminal prosecution against the union officer. Admittedly, these same books and records belonged to Local 266 and were seized on the premises of Local 266.

When discussing the problem of standing, it is important to distinguish the right to raise the Fifth Amendment by a corporate or union officer in response to a lawful subpoena and the right to claim the Fourth Amendment where an illegal search and seizure has occurred. In fact, there has never been any claim of a Fifth Amendment right or privilege with respect to the production of the union records. *United States ex rel. DeForte v. Mancusi,* 261 F. Supp. at 580. The Court of Appeals, therefore, in this case, recognized the thorny area of "standing" under the Fourth Amendment (379 F. 2d at 899), and predicated its decision upon *Jones v. United States,* 362 U. S. 257, which attempted to articulate rules of guidance in the difficult area of standing (379 F. 2d at 900).

In *Jones,* the defendant was charged with possession of narcotics, a possessory crime which alone was sufficient convict. Jones sought suppression of certain evidence under Rule 41 (e)[1] of the Federal Rules of Criminal Pro-

[1] *Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure* may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained. * * *"

cedure. The Government contended Jones did not allege ownership of the seized articles or an interest greater than an invitee or a guest in the apartment which was searched. This Court held that Jones had standing to object to search and seizure because:

> 1. Where possession both convicts and confers standing, a defendant need not make a preliminary showing of an interest in the premises searched or the property seized and
>
> 2. Defendant's presence in the apartment with the permission of the person whose apartment it was, made out a sufficient interest in the premises to constitute him a 'person aggrieved' by the search (362 U. S. at 262).

While admittedly *Jones* has been extended by the Court of Appeals to cover an area of standing not considered in *Jones*, the decision is not a departure from prior decisions of the Supreme Court. Even so, the extension is rational and desirable. *Jones* evolved as a result of a possessory crime and the language of *Jones* is vital in determining what the case held and did not hold. Clearly, this Court decided that a defendant need not admit "ownership of narcotics" and need not own the premises where the search occurred. This Court's rationale began with citing Rule 41(e) of the Federal Rules of Criminal Procedure:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure', one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else" (362 U. S. at 262).

After discussing the "dilemma" of a defendant who was required to claim ownership or possession of narcotics in

order to gain standing, this Court stated that "the same element, *i.e.*, possession which convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized" (362 U. S. at 262). This Court went further and stated:

> "Even were this not a prosecution turning on illicit possession the legally requisite interest in the premises was here satisfied, for it need not be as extensive as a property interest as was required by the courts below * * *. No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him" (362 U. S. at pages 262-266).

The Court of Appeals thus applied the *Jones* rationale to allow Respondent standing. The Court also concluded that *Jones* informs us what is not required to confer standing but did not formulate rules for determining what is required. (379 F. 2d at 902.) Applying *Jones* to the facts, the Court of Appeals concluded:

> 1. Respondent was the victim of the search and seizure as it was directed against him, and
>
> 2. Respondent's privacy was invaded by the illegal search and seizure of books and records belonging to Local 266 as he was legitimately on the premises of Local 266 when the search and seizure occurred.

In essence, the Court of Appeals has obliterated in this case the requirement that a union officer must own the books and records which he seeks to suppress or the premises where the search and seizure occurred. It would be fruitless to explain the decision of the Court of Appeals

further as the opinion speaks for itself. Furthermore, and by way of background, Respondent's counsel filed with the Court of Appeals a forty-page brief which is available and may be of assistance to this Court. Prior decisions of this Court have not been rejected by the Court of Appeals and, if anything, the Fourth Amendment has been strengthened.

2. There is a conflict among the Circuit Courts of Appeals in the application of *Jones v. United States* relative to standing.

Respondent's counsel acknowledges that the Courts of Appeals have disagreed on the interpretation and application of *Jones* where corporate books and records have been seized and subsequently introduced in a criminal prosecution against a corporate officer. Counsel for the Respondent also concedes that the decision of the Court of Appeals for the Second Circuit completely overrules previous decisions established in that Circuit, *i.e. United States v. Guterma*, 272 F. 2d 344; *United States v. Antonelli Fireworks Co.*, 155 F. 2d 631, cert. denied 329 U. S. 742; *United States v. DeVasto*, 52 F. 2d 26, cert. denied 284 U. S. 678.

First Circuit: The main case of *Cooper's Express, Inc. v. I. C. C.*, 330 F. 2d 338, and supporting cases, cited by petitioner, do not deal directly with an unlawful search and seizure but rather an inspection by government officials of corporate premises, included books and records.

Third Circuit: This Circuit has limited *Jones v. United States* to possessory crimes in *United States v. Grosso*, 358 F. 2d 154; certiorari granted, 338 U. S. 810, and refused to allow a corporate officer standing to object to the seizure of books and records belonging to a corporation; *United States v. Goldberg*, 330 F. 2d 30, which relied on *United States v. Guterma*, 272 F. 2d 344 (2nd Cir.) and *Lagow v. United States*, 159 F. 2d 245 (2nd Cir.).

Fourth Circuit: None of the corporate records were unlawfully seized in *United States v. Hopps,* 331 F. 2d 332; cert. denied, 379 U. S. 820 and, therefore, the Fourth Amendment did not require suppression of corporate records by an officer-defendant. There was recognition of the problem of standing and the conflicts in existence prior to the case at bar in the Second and Fifth Circuits (331 F. 2d at 340-341).

Fifth Circuit: Henzel v. United States, 296 F. 2d 650, applied *Jones* in the suppression under the Fourth Amendment of corporate books and records in a criminal prosecution against the corporation's president. This doctrine was subsequently approved in *Peel v. United States,* 316 F. 2d 907.

Ninth Circuit: The most recent pronouncement in this Circuit involving a corporate officer's standing to suppress an alleged unlawful search and seizure is *Hill v. United States,* 374 F. 2d 871, cert. denied, ____ U. S. ____, 36 U. S. L. Week 3144 (October 10, 1967, No. 318). This Court denied standing and the application of *Jones,* since the books and records belonged to the corporation; the defendant did not have an interest in the premises searched and no possessory crime, relying on prior decisions in the Second Circuit.

Tenth Circuit: In *Villano v. United States,* 310 F. 2d 680, the Court did not accept or reject the language of *Henzel v. United States* but applied *Jones* where an employee was seeking to have a notebook of his employer suppressed, which was taken from a common desk.

Petitioner has advised this Court that there is "a variety and inconsistency of approaches and results by the various Courts of Appeals". Page 14 of petitioner's brief. Coun-

sel for the Respondent has no alternative but to admit to the truth of this statement. The decision of the Court of Appeals however, is rationally correct and this Court should deny the petition for certiorari even if there is a conflict.

3. The Court of Appeals correctly applied the rule of standing in a *Habeas Corpus* proceeding.

In *Linkletter v. Walker,* 381 U. S. 618, this Court ruled that the exclusionary rule of *Mapp v. Ohio,* 367 U. S. 643, applied to state court convictions which had not become final[2] before its rendition. Respondent's appeal was not finally adjudicated until October 14, 1963, by denial for writ of certiorari to this Court. Respondent therefore, was entitled to the exclusionary rule.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Dated: Buffalo, New York, December 27, 1967.

Respectfully submitted,

JAMES L. LEKIN,
Attorney for Respondent.

SAPERSTON, WILTSE, DUKE, DAY & WILSON,
of counsel.

---

[2] "By final, we mean where the judgment of conviction was rendered, the availability of appeal was exhausted and the time for petition for certiorari had elapsed before our decision in *Mapp.*" 381 U. S. 622, Footnote 5.

SUPREME COURT, U. S.
MAR 8 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 844

VINCENT R. MANCUSI, Warden of Attica State Prison, Attica, New York,

Petitioner,

against

FRANK DEFORTE,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner
Office & P. O. Address
80 Centre Street
New York, New York 10013

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

MICHAEL H. RAUCH
Assistant Attorney General
of Counsel

249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions	2
Statement of the Case	3
Summary of Argument	6
POINT I—The taking without a warrant of the books and records of the local union from the union offices was not violative of any of the respondent's personal constitutional rights	9
A. The respondent labor union official had no personal constitutional privilege with respect to the union books and records	11
B. The respondent's Fourth Amendment rights were not infringed by the search of the union offices	16
POINT II—New rules of standing in Fourth Amendment cases should not be enunciated on habeas corpus review of the respondent's final state court judgment of conviction especially since the respondent's trial occurred prior to the decision in *Mapp* v. *Ohio*	24
Conclusion	26

PAGE

Cases:

Adams v. New York, 192 U. S. 585 9
Angelet v. Fay, 381 U. S. 643 ..... 8, 24
Boyd v. United States, 116 U. S. 616 ....7, 9, 11, 12, 13, 19
Cooper's Express v. I.C.C., 330 F. 2d 338 (1st Cir.) .. 18
Curcio v. United States, 353 U. S. 118 .....7, 11, 13
Davis v. United States, 328 U. S. 582 13
Fahy v. Connecticut, 375 U. S. 85 25
Freeman v. United States, 201 A. 2d 22 (D. C. Court of Appeals) 18
Go-Bart Importing Co. v. United States, 282 U. S. 344 7
Goldstein v. United States, 316 U. S. 114 .....6, 10
Gouled v. United States, 255 U. S. 298 7
Hale v. Henkel, 201 U. S. 43 11
Hester v. United States, 265 U. S. 57 17
Hill v. United States, 374 F. 2d 871 (9th Cir.), *cert. denied* 389 U. S. 842 13
Hoffa v. United States, 385 U. S. 296 10
Johnson v. New Jersey, 384 U. S. 719 .....8, 25, 26
Jones v. United States, 362 U. S. 257 . .5, 8, 19, 20, 21, 22, 23
Katz v. United States, 389 U. S. 347 .....7, 17, 23
Ker v. California, 374 U. S. 23 25
Lagow v. United States, 159 F. 2d 245 (2d Cir.) 7, 12
Linkletter v. Walker, 381 U. S. 618 .....24, 25
Mapp v. Ohio, 367 U. S. 643 .....2, 3, 6, 8, 9, 13, 24, 25, 26
Nardone v United States, 308 U. S. 338 9

PAGE

Owen v. Kennedy, —— U. S. ——, 11 L. ed. 2d 18 .. 12

People v. DeGrandis, *et al.*, 16 A. D. 2d 834, 228 N.Y.S. 2d 875 (2d Dept.), *affirmed*, 12 N. Y. 2d 812, 187 N. E. 2d 130, *remittitur amended*, 12 N. Y. 2d 946, 188 N. E. 2d 794, *cert. denied* 375 U. S. 868 4

See v. City of Seattle, 387 U. S. 541 7

Silverthorne Lumber Co. v. United States, 251 U. S. 385 16

Stoner v. California, 376 U. S. 483 25

Stovall v. Denno, 385 U. S. 293 26

Tehan v. Shott, 382 U. S. 406 25

United States v. Blok, 188 F. 2d 1019 (D. C. Cir.) .. 7, 18

United States v. Collins, 349 F. 2d 863 (2d Cir.), *cert. denied* 383 U. S. 893, *rehearing denied* 384 U. S. 947 18

United States v. DeVasto, 52 F. 2d 26 (2d Cir.), *cert. denied* 284 U. S. 678 19

United States v. Epstein, 240 F. Supp. 84 (S.D.N.Y.) 13

United States v. Fago, 319 F. 2d 791 (2d Cir.), *cert. denied* 375 U. S. 906 ..... 7, 12

United States v. Goldberg, 330 F. 2d 30 (3d Cir.), *cert. denied* 377 U. S. 953 13

United States v. Jeffers, 342 U. S. 48 22

United States v. Lewis, 385 U. S. 206 ..... 7, 17, 22, 24

United States v. Silverstein, 314 F. 2d 789 (2d Cir.), *cert. denied* 374 U. S. 807 ..... 7, 12

United States v. The Schooner Peggy, 5 U. S. (1 Cranch) 102 25

PAGE

United States v. White, 322 U. S. 694 ..... 7, 12

Villano v. United States, 310 F. 2d 680 (10th Cir.) .. 18

Warden v. Hayden, 387 U. S. 294 .....8, 22, 23

Weeks v. United States, 232 U. S. 383 ..... 6, 9

Wheeler v. United States, 226 U. S. 478 12

Wilson v. United States, 221 U. S. 361 .....7, 11, 14, 15

Wong Sun v. United States, 371 U. S. 471 ..... 6, 10

CONSTITUTIONAL AND STATUTORY PROVISIONS

Costitution of the United States:

Amendment IV 16, 17, 18, 19, 24

Title 28 United States Code:

§ 1254(1) 2

§ 2244(b) 5

New York General Business Law:

§ 340 3

New York Penal Law:

Former § 530 3

Former § 580 3

Former § 850 3

Former § 851 3

MISCELLANEOUS

McCormick, Evidence (1954) 9

8 Wigmore, Evidence (McNaughton Rev. 1961) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 844

VINCENT R. MANCUSI, Warden of Attica State Prison, Attica, New York,

Petitioner,

against

FRANK DEFORTE,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (A. 30-44) is reported at 379 F. 2d 897. The opinion of the United States District Court for the Western District of New York (A. 23-29) is reported at 261 F. Supp. 579.

Jurisdiction

The judgment of the Court of Appeals was entered on June 28, 1967 (A. 45) and a timely motion for rehearing or rehearing in banc was denied by orders of the Court of Appeals entered on August 25, 1967 (A. 46-47). The petition for a writ of certiorari was filed on November 21, 1967 and was granted on January 22, 1968. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented

Was the respondent labor union official's personal Fourth Amendment right to be secure in his "persons, houses, papers and effects" violated by the seizure of union books and records from the union office without a warrant?

Should federal habeas corpus review of final state court judgments of conviction be utilized as a vehicle for announcing new rules of standing in Fourth Amendment cases, especially where the trial of the habeas applicant occurred prior to the decision in *Mapp* v. *Ohio*, 367 U. S. 643.

Constitutional Provisions

Constitution of the United States:

Amendment IV. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of the Case

The respondent was a vice president of Local 266 of the Teamsters Union. He was indicted, along with two other union officials and twelve other defendants, by a grand jury of Nassau County, New York, for conspiracy (N. Y. Penal Law, former § 580), coercion (N. Y. Penal Law, former § 530), and extortion (N. Y. Penal Law, former §§ 850 and 851). The indictment charged that the defendants, using the Union Local as a facade and shield, were engaged in a conspiracy to monopolize the juke box industry in the metropolitan New York area in violation of New York General Business Law § 340. The indictment further charged that the defendants coerced and extorted money from juke box owners by compelling the payment of tribute in the guise of union initiation fees, dues and monthly assessments.

On May 13, 1959, prior to the return of this indictment, a subpoena duces tecum was issued to Local 266 by the Nassau County District Attorney's office commanding that the union forthwith produce certain of its books and records at the County Courthouse, Mineola, Long Island (A. 22). Upon the refusal of the respondent to comply with this subpoena, the union books and records were seized by the police and subsequently introduced, over objection, at the trial. Since the trial took place in 1960, prior to the decision in *Mapp* v. *Ohio*, 367 U. S. 643, there was no pre-trial motion to suppress or hearing in the state courts regarding the facts surrounding the search and seizure. Nor was there an evidentiary hearing in the District Court. However, the essential facts are not in dispute and were detailed in a stipulation submitted to the Circuit Court of Appeals in the form of a letter (A. 50-52).

The subpoena was served upon the respondent, as custodian of the union records, at the union office. The respondent, as a vice president of the union, had a desk in

the one large room which comprised the union office. There were other desks used by other union officials in this room. When the respondent refused to comply with the subpoena, the police, over the objection of several union officials present, including the respondent, seized certain union books and records. The seized items included the union charter, bank books, deposit slips, and check stubs. It does not appear in the record and it is not alleged that any of these items, or any other items, were taken from the respondent's person or from his desk or from any area set aside for his personal use. Nor does the respondent contend that any of the seized items were his personal property. He did, however, participate in the preparation of many of the seized union records in his capacity as a union official. The union, which was never charged with or indicted for any crime, apparently did not seek return of the seized items, most of which were introduced into evidence, over objection, at the respondent's trial.

The respondent and two other union officials were convicted by jury verdict and the respondent was sentenced on June 21, 1960 to state prison for a term of three to five years. The judgment of conviction was affirmed by the Appellate Division of the New York Supreme Court, that Court holding that the defendants could not invoke the Fourth Amendment to the Constitution with respect to the union records since they were not the personal papers and effects of the defendants who had possession of them in a representational rather than private capacity. *People* v. *DeGrandis, et al.*, 16 A. D. 2d 834, 228 N.Y.S. 2d 875 (2d Dept.). The New York Court of Appeals affirmed without opinion, *People* v. *DeGrandis, et al.*, 12 N. Y. 2d 812, 187 N. E. 2d 130, and amended its remittitur to indicate that it had held, *inter alia*, that no individual rights of the defendants had been violated by the search and seizure of the union records. 12 N. Y. 2d 946, 188 N. E. 2d 794. On October 14, 1963 this Court denied certiorari (375 U. S. 868).

Thereafter, the respondent sought a federal writ of habeas corpus on the ground of alleged coercion of the jury. The denial of the writ was unanimously affirmed by the Court of Appeals for the Second Circuit (335 F. 2d 173). The respondent, who was represented by the same counsel who prosecuted his state appeals, made no challenge to the seizure of the union records in that proceeding. See, 28 U.S.C. § 2244(b).

However, the respondent then sought another federal writ of habeas corpus, this time on the ground that the Fourth Amendment to the Constitution prohibited the introduction into evidence of the union's books and records which were seized when the union refused to produce them as demanded by the subpoena. The United States District Court for the Western District of New York (HENDERSON, J.) concluded that the standards enunciated in this Court's decision in *Jones* v. *United States,* 362 U. S. 257, did not apply to non-possessory crimes and would be singularly inappropriate if applied as a constitutional mandate to cases involving corporate or union books and records. Accordingly the District Court held that the respondent's constitutionally protected rights were not violated by the search of the union offices and the seizure of the union records. In reaching this decision the District Court followed a long line of decisions by this Court and by the Court of Appeals for the Second Circuit which emphasize the personal nature of Fourth Amendment rights (A. 27).

On appeal the Court of Appeals for the Second Circuit reversed and directed that the writ of habeas corpus issue. The Court observed that *Jones* v. *United States, supra,* did not formulate any affirmative tests for standing in cases such as this and concluded that decision must be made on a case-by-case basis. The Court of Appeals found that prior decisions of this Court, relied upon by the District Court, which declined to extend Fourth and Fifth Amendment rights in corporate or union records to corporate or union officials, were inapplicable under the circumstances

of this case. It held that the respondent was entitled to suppression of the union books and records because the search was "directed at" him and invaded his personal right of privacy since it occurred at his place of business; because he was lawfully on the premises when the search and seizure occurred; and because he had contributed to the preparation of a substantial portion of the books and records that were seized.

After the denial of motions for rehearing (A. 46) and rehearing in banc (A. 47), an order was entered in the United States District Court for the Western District of New York releasing the respondent on his own recognizance pending hearing and disposition of further proceedings in this Court (A. 48-49).

Summary of Argument

I. Notwithstanding the rule barring the introduction of unlawfully seized evidence at criminal trials, *Weeks* v. *United States*, 232 U. S. 283; *Mapp* v. *Ohio*, 367 U. S. 643, the Court has continued to adhere to the common law rule of non-exclusion of such evidence in the absence of a showing that the objecting defendant's personal rights of privacy and security were infringed by the allegedly unlawful search and seizure. *Wong Sun* v. *United States*, 371 U. S. 471; *Goldstein* v. *United States*, 316 U. S. 114. The challenged evidence in the instant case does not fall within the exclusionary rule because the union records taken from the union offices concededly did not belong to the respondent and he therefore had no personal rights or privileges with respect to them and the place from which the records were taken was not an area in which the respondent had a constitutionally protected right of personal privacy.

A. It is well established that a union or corporate officer has no personal privileges under either the Fourth or the Fifth Amendment with respect to the corporate books and

records even if he is charged with their custody. *United States* v. *White*, 322 U. S. 694; *Wilson* v. *United States*, 221 U. S. 361. A union or corporate official who has custody of the organization's books "does not own the records and has no legally cognizable interest in them." *Curcio* v. *United States*, 354 U. S. 118, 128. This conclusion is unaffected by the fact that the official may have prepared part or all of the records in his official capacity or by the fact that the records are taken because of an investigation directed against the individual rather than against the organization. *Wilson* v. *United States, supra.* Accordingly, the taking of the union records in the instant case did not infringe the personal right of the respondent to be secure in his "papers or effects" and the Circuit Court of Appeals incorrectly concluded that the search and seizure of the union records in this case violated any of the respondent's Fourth Amendment rights. See, *e.g.*, *United States* v. *Fago*, 319 F. 2d 791 (2d Cir.), *cert. denied* 375 U. S. 906; *Lagow* v. *United States*, 159 F. 2d 245 (2d Cir.); *cf.*, *United States* v. *Silverstein*, 314 F. 2d 789 (2d Cir.), *cert. denied*, 374 U. S. 807.

B. Individuals may complain of a search of commercial premises only where they can show that the search violated their personal rights, such as where a private desk is searched and private papers seized, *Gouled* v. *United States*, 255 U. S. 298; *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344; *United States* v. *Blok*, 188 F. 2d 1019 (D. C. Cir.), or where the search occurred on premises over which the individual has exclusive personal control. *See* v. *City of Seattle*, 387 U. S. 541. But the respondent has failed to show that his relationship to the place where the search occurred, *Katz* v. *United States*, 389 U. S. 347; *United States* v. *Lewis*, 385 U. S. 206, rendered the search and seizure an "intrusion in the sanctity of a man's home and the privacies of life." *Boyd* v. *United States*, 116 U. S. 616, 630. The union office consisted of one large

room shared by several people including the respondent and there has been no claim that the respondent's desk or any other area set aside for his personal use was searched. Thus, no personal rights of the respondent were violated by the search of the union premises. The case of *Jones* v. *United States*, 362 U. S. 257, does not warrant a different result. The crux of that decision, insofar as the individual's relationship to the premises is concerned, is that an individual cannot be denied standing solely because his presence on the premises could be described by a common law property category of less than owner. However, that case did not hold that simple presence on the premises conferred standing in the absence of any personal or private interest in the premises; on the contrary, the decision adhered to the requirement that "a legally requisite interest in the premises", 362 U. S. at p. 261, be shown in order for an individual to claim that a search of the premises violated his personal constitutional rights. Indeed the Court emphasized that the individual is required to show "that he himself was the victim of an invasion of privacy", 362 U. S. at p. 261. The Fourth Amendment protects the individual only against such invasions, *Warden* v. *Hayden*, 387 U. S. 294, and the respondent has failed to show on this record that his personal privacy was invaded by the search and seizure in this case.

II. A holding that the respondent's personal Fourth Amendment rights were violated by the search and seizure in this case would represent a significant departure from prior rules of standing under the Fourth Amendment and, like other new Fourth Amendment rules, should not be enunciated on collateral attack so as to apply retrospectively to final judgments of conviction. *Angelet* v. *Fay*, 381 U. S. 643. In any event, the respondent should not be entitled to invoke the exclusionary rule of *Mapp* v. *Ohio*, *supra*, in this federal habeas corpus proceeding since his trial commenced and was concluded prior to the date of that decision. *Johnson* v. *New Jersey*, 384 U. S. 719.

POINT I

The taking without a warrant of the books and records of the local union from the union offices was not violative of any of the respondent's personal constitutional rights.

It was a well established rule at common law that the means by which evidence was procured did not affect its admissibility at trial unless the evidence was obtained in violation of the privilege against self-incrimination. McCormick, Evidence § 137 (1954); 8 Wigmore, Evidence §§ 2183-2184 b, 2264 (McNaughton Rev. 1961). Even after the landmark case of *Boyd* v. *United States,* 116 U. S. 616, this rule was followed by the Court with respect to Fourth Amendment claims. *Adams* v. *New York,* 192 U. S. 585. However, with emphasis upon the protection against invasions of "the sanctity of a man's home and the privacies of life", *Boyd* v. *United States,* 116 U. S. at p. 630, a further exception to the common law rule was announced in *Weeks* v. *United States,* 232 U. S. 383. This exclusionary rule has evolved from a dual but complementary concern for the protection of individual privacy and the protection against compulsory self-incrimination reflected in the Fourth and Fifth Amendments which together maintain large areas of personal privacy inviolate from governmental invasion. *Mapp* v. *Ohio,* 367 U. S. 643, 656-57.

The Court has nevertheless consistently recognized that "Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land". *Nardone* v. *United States,* 308 U. S. 338, 340. Rules of standing must be considered in this context. In order to insure that the values of personal freedom and security expressed in the Constitution remain inviolate, it is necessary for society sometimes to pay the price of freeing the guilty. However,

society also must be protected from increasingly pervasive criminal activities; with this in mind, relevant evidence of guilt should be excluded only where it is unmistakably clear that such a drastic measure is required to protect the personal rights secured by the Constitution.

The Court has recognized the need for striking such a balance and has accordingly adhered to the common law rule of non-exclusion of unlawfully seized evidence where it does not appear that the individual defendant's personal rights of privacy and security were invaded. *Goldstein* v. *United States*, 316 U. S. 114. See also, *Wong Sun* v. *United States*, 371 U. S. 471, where the Court emphasized at p. 484 that the *Weeks* exclusionary rule was designed "to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person" and therefore refused to exclude unlawfully obtained evidence from use against a defendant who had no right of privacy of person or premises invaded by the seizure. In evaluating a claim of standing, the Court must look to whether or not the government invaded the objecting defendant's rights of personal privacy and security, *i.e.*, the right to be secure in *his* "persons, houses, papers and effects". As the Court has pertinently observed:

> "What the Fourth Amendment protects is the security a man relies upon when he places *himself* or *his property* within a constitutionally protected area, be it *his* home or *his* office, *his* hotel room or *his* automobile. There he is protected from unwarranted intrusion. And when he puts something in *his* filing cabinet, in *his* desk drawer or in *his* pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable seizure. . . ." *Hoffa* v. *United States*, 385 U. S. 296, 301. (Emphasis supplied.)

Tested by this standard as well as by the prior decisions of the Court, the search of the union offices and seizure of

the union records did not violate any of the respondent's Fourth Amendment rights. The records concededly did not belong to the respondent and he had no personal rights with respect to them and the place from which they were seized was not an area in which the respondent had a constitutionally protected right of personal privacy. He was, therefore, not entitled to the exclusion of the union books and records at his trial.

A.

The respondent labor union official had no personal constitutional privilege with respect to the union books and records.

The Court has consistently concluded that a corporate or union official who has custody of the organization's books and records "does not own the records and has no legally cognizable interest in them" and therefore cannot protest against their compulsory production. *Curcio* v. *United States,* 354 U. S. 118, 128. Moreover, the rationale of this conclusion is usually found by reference to the condemnation in *Boyd* v. *United States, supra,* of compulsory production of *private* papers. See, *Hale* v. *Henkel,* 201 U. S. 43. Thus, in *Wilson* v. *United States,* 221 U. S. 361, the Court held that, because of the nature of corporate documents and the purely custodial capacity in which they were held, the corporate officer had no personal privilege with respect to such documents and distinugished the *Boyd* case because of the emphasis in that case upon the fact that *private* papers were involved. 221 U. S. at p. 380. Similarly, in *United States* v. *White,* 322 U. S. 694, this rationale was extended to a labor union official who was held to have no personal Fourth or Fifth Amendment rights to object to the compulsory production of union records since the only papers and effects which are subject to a personal privilege "must be the private property of the person claiming the privilege, or at least in his possession in a

purely personal capacity. *Boyd* v. *United States*, 116 U. S. 616". 322 U. S. at p. 699. In *White*, as in the case at bar, "the documents [the union officer] sought to place under the protective shield of the privilege were official union documents held by him in his capacity as a representative of the union. No valid claim was made that any part of them constituted his own private papers". 322 U. S. at p. 704.

It is true, as the Circuit Court of Appeals noted (A. 41, n. 9) that these are all cases in which the corporate or union officer was convicted of contempt for failure to comply with a valid subpoena rather than, as in the instant case, a seizure of the books. But to distinguish the cases on that ground, as the Circuit Court did, is to ignore the principles of law which they explicitly announced—that the corporate or union official has no personal privilege, under either the Fourth or the Fifth Amendment, in the union or corporate records. Since the officers of an organization are engaged in institutional activity as opposed to wholly individual activity, they can make no claim of personal privilege regarding the organization's records. *United States* v. *Silverstein*, 314 F. 2d 789 (2d Cir.), *cert. denied*, 374 U. S. 807. Thus, the manner in which the books are taken cannot, as the Circuit Court seemed to assume, clothe the books and records with a personal privilege which did not exist before they were seized. Non-private papers do not become private by virtue of an unlawful seizure.

The cases have consistently emphasized "the character of the books and records as corporate records and documents", *Wheeler* v. *United States*, 226 U. S. 478, 490, in concluding that such records are clothed with no personal privilege on behalf of the official who is a mere custodian rather than the owner. See, *e.g.*, *Owen* v. *Kennedy*, —— U. S. ——, 11 L. ed. 2d 18; *United States* v. *Fago*, 319 F. 2d 791 (2d Cir.), *cert. denied*, 375 U. S. 906; *Lagow* v.

United States, 159 F. 2d 245 (2d Cir.); *United States* v. *Goldberg*, 330 F. 2d 30 (3d Cir.), *cert. denied*, 377 U. S. 953; *Hill* v. *United States*, 374 F. 2d 871 (9th Cir.), *cert. denied*, 389 U. S. 842; *United States* v. *Epstein*, 240 F. Supp. 84 (S.D.N.Y.). This conclusion is, of course, the most consonant with the language of the Fourth Amendment; simply stated, that Amendment does not guarantee an individual freedom from unreasonable searches of a third party's property.

Moreover, the Circuit Court's disregard of cases of this Court on the ground that they involved a Fifth rather than a Fourth Amendment privilege was completely unjustified. In the first place, such cases as *Wilson* and *White* explicitly deal with both the Fourth and Fifth Amendments. Secondly, and most important, it would be irrational to conclude that an individual's personal rights in books and records varied according to which Amendment he invokes. No personal privilege is more firmly imbedded in our law than the privilege against self-incrimination. See, *e.g.*, *Boyd* v. *United States*, *supra*. Even the most minimal personal interest in incriminating documents may justify a conclusion that a defendant may not be compelled to produce them. Corporate records have been held many times by the Court not to be clothed with even this minimal personal interest. The personal rights of a corporate officer for Fourth Amendment purposes cannot be any greater. Indeed, the Court's statement in *Curcio* v. *United States*, 354 U. S. at p. 128, that an official who has custody of an organization's records "has *no* legally cognizable interest in them" (emphasis supplied) can only be read to exclude any Fourth Amendment as well as any Fifth Amendment interest. This is particularly true in cases involving documents and papers where "the Fourth and Fifth Amendments run almost into each other". *Boyd* v. *United States*, 116 U. S. at p. 630. See also, *Mapp* v. *Ohio*, 367 U. S. at pp. 656-657 and the concurring opinion of Mr. Justice Black, 367 U. S. at p. 661; *Davis* v. *United States*, 328 U. S. 582.

Finally, the Circuit Court, casually brushing aside the clear meaning of both its own decisions and those of this Court, pointed to several factors which it felt operated to clothe the union books and records with a sufficient personal interest on the part of the respondent to justify their conclusion that his personal security and privacy were violated by the seizure. First, said that Court, the records became his private records within the meaning of the Fourth Amendment because the search was "directed at" the respondent and not at the union (A. 39). Secondly, implied the Court, the fact that the respondent prepared a substantial part of the union books and records in his capacity as a union official somehow clothed them with an aura of personal privacy (A. 40). Sufficient answer to both contentions was long ago provided by this Court in *Wilson* v. *United States,* 221 U. S. at p. 378:

> ". . . the mere fact that the [respondent] himself wrote, or signed, the official letters copied into the books, neither conditioned nor enlarged his privilege . . ."

and at p. 385:

> "Nor is it any answer to say that in the present case the inquiry before the grand jury was not directed against the corporation itself. The appellant had no greater right to withhold the books by reason of the fact that the corporation was not charged with criminal abuses."

These unequivocal rejections of the Circuit Court's theory are well founded in reason. Most individuals who assert a privilege in corporate records will have prepared a significant portion of such records but the point is that they will have done so in other than a personal, private capacity just as they are not custodians of the records in a personal, private capacity. As the Court emphasized in

Wilson v. *United States*, 221 U. S. at p. 380, "The question still remains with respect to the nature of the documents and the capacity in which they are held." But neither the respondent nor the Circuit Court addressed themselves squarely to this question and neither has suggested how the nature of corporate documents becomes personal and private simply because a corporate officer has prepared a part of the documents which reveal his criminal activities. The logic of the Circuit Court's reasoning would mean that an embezzler could claim a privilege in the altered books of his employer. Or, in the context of this case, that the respondent, who utilized a local union as an instrumentality for his illegal activities could subrogate himself to any Fourth Amendment claim the union might assert. No important constitutional purpose would be furthered by such a rule.

Similarly, the "directed against" standard employed by the Circuit Court is irrational. It totally fails to explain how a search for non-private papers converts these papers into private papers. Moreover, carried to its logical conclusion, such a standard offers a shelter only to those whom the police suspect of crimes. Surely the right of personal privacy in "papers and effects" is not to be tested by what is in the mind of the police officer who conducted the search.* Finally, the Circuit Court appears to reason that since the union was never charged with a crime, there is all the more reason to conclude that the respondent was the object of the search and should have standing. This is circular. The argument is that if the union had also been charged, it could object under the Fourth Amendment and

---

* In the context of this case, such a test would be particularly meaningless. There were fifteen defendants, including respondent, indicted and tried in this case. It is difficult to perceive how the seizure, which occurred prior to the return of the indictment, could truly be said to have been "directed against" any one or more individuals in particular, in terms of what the police were looking for.

obtain return of its records. Since it was not charged and apparently did not seek return of its records, there is no reason why the respondent should in effect be held to have the rights which the union might have asserted *arguendo*.

Silverthorne Lumber Co. v. *United States*, 251 U. S. 385, does not require a different conclusion. That case deals with the assertion of Fourth Amendment rights by the corporation, unlike the instant case where the respondent attempts to assert personal rights derivative from the intrusion onto union premises and seizure of union records. The crux of the *Silverthorne* decision is that the government should not be permitted to subvert an order directing the return of property unlawfully seized by them by then attempting to subpoena that same property. Indeed this is the only reading of *Silverthorne* consistent with the principle that corporate papers may be subpoenaed in an investigation of a corporate officer. And this is far from establishing any kind of independent derivative right in favor of the corporate officer.

Thus, none of the factors or standards proposed by the Circuit Court of Appeals is sufficient to establish that the respondent had a personal interest in the union records, which concededly did not belong to him, so that their seizure was a seizure of "his . . . papers or effects". In consequence, the seizure of the union's papers did not, as such, violate any of the respondent's Fourth Amendment rights.

B.

The respondent's Fourth Amendment rights were not infringed by the search of the union offices.

A fundamental principle of our society is that an individual is entitled to rely upon the privacy of his home. His activities there, as well as any "papers or effects" which he keeps there, are explictly protected by the Fourth

Amendment. The inviolability of the home rests upon the presumption that what occurs in the home or what is kept there is intended to be kept secret at the discretion of the individual and the individual is entitled to rely upon this secrecy. This presumption can be overcome, *cf., Lewis* v. *United States,* 385 U. S. 206, but it rests upon the strong belief that an individual controls the activities in his home and it is properly within his control to determine whether such activities remain secret or not. Once outside of the home, the individual must show that there is something about his relationship to the place which entitles him to believe that he has control over whether activities conducted there or items kept there will remain secret.

The Fourth Amendment is designed to protect individual privacy against certain kinds of intrusion and its applicability must be determined by an analysis of the individual's relationship to the place where such an intrusion occurs. *Katz* v. *United States,* 389 U. S. 347. Although the privacy which the Fourth Amendment protects is to some extent dependent upon the intention of the individual not to disclose certain things, *Katz* v. *United States, supra,* this cannot be the sole test. If it were, then depositing something in an open field with the intent that it remain hidden would entitle the individual to the protection of the Fourth Amendment with respect to the hidding place. But the Fourth Amendment no more extends to this, *cf., Hester* v. *United States,* 265 U. S. 57, than it would to the activities of the defendant in a telephone booth which are visible to persons outside the booth. *Katz* v. *United States, supra,* at p. 352.

The Fourth Amendment should not automatically be interpreted to mean that an individual corporate or union officer or employee is entitled to believe that the organization's books and records and premises are identical with his "persons, houses, papers and effects" so that they are clothed with a personal privilege on his behalf. Just

as his role as custodian of the records gives him no personal rights in the records, his role as an officer or employee of the institution does not, without more, give him any personal rights in the union or corporate premises. This does not necessarily mean that there are no circumstances in which the individual's personal Fourth Amendment rights may be violated by a search of corporate or union premises. But the respondent has made no showing that the search and seizure here intruded into anything more private than an office which he shared with others and books and records which he helped prepare in his capacity as a union official. The only personal or private factor is that the respondent was using his position as a union official to engage in criminal activities. Surely the use of the union offices as a base for his criminal activities no more entitles him to the shelter of the Fourth Amendment, than the use of the home for such purposes entitled the defendant in *Lewis* to the shelter of the Fourth Amendment.

In the instant case, there has been no claim that any area set aside for the exclusive personal use of the respondent, such as his desk or his locker, was searched. *Compare, United States* v. *Blok,* 188 F. 2d 1019 (D. C. Cir.), *with Freeman* v. *United States,* 201 A. 2d 22 (D. C. Court of Appeals), and *United States* v. *Collins,* 349 F. 2d 863 (2d Cir.), *cert. denied,* 383 U. S. 893, *rehearing denied,* 324 U. S. 947. *But see also, Villano* v. *United States,* 310 F. 2d 680 (10th Cir.), *and compare with Cooper's Express* v. *I.C.C.,* 330 F. 2d 338 (1st Cir.). Nor was the respondent's private office searched; on the contrary, it appears that the union offices consisted of one large room in which several people, including the respondent, had desks. Thus there is no support for the Circuit Court's assumption, basic to its conclusion, that the office was the union office *de jure,* but the respondent's office *de facto* (A. 40). Under these circumstances, the search of the office and seizure of union books and records could

hardly be called as intrusion into "the sanctity of a man's home and the privacies of life". *Boyd* v. *United States,* 116 U. S at p. 630.

Prior decisions of this Court dealing with searches of offices or commercial premises support this conclusion. For example, in *Gouled* v. *United States,* 255 U. S. 298, not only was the search conducted in the defendant's private office but also the defendant's personal desk was searched and his private papers seized. Similarly, in *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, there was a search of the persons of the individual corporate officers as well as a search of their desks and even a seizure of some items belonging to the individuals. Accordingly, *Go-Bart* was not followed in a case involving seizure of only corporate records from corporate premises. *United States* v. *DeVasto,* 52 F. 2d 26 (2d Cir.), *cert. denied* 284 U. S. 678. *See* v. *City of Seattle,* 387 U. S. 541, dealing with administrative investigations, reiterates the rule that commercial premises may be clothed with an individual right of privacy. There the defendant was the owner of a warehouse that was maintained as locked premises that were inaccessible to anyone except the defendant (see 408 F. 2d 262). Thus, his right to use the premises was an exclusive personal right. It is not difficult to conclude that a search of such premises would constitute an intrusion on the defendant's personal privacy. But in the case at bar there is no claim that the respondent's right to use the premises was a personal right and it clearly appears that it was not an exclusive right.

Contrary to the view of the Circuit Court of Appeals in the instant case, *Jones* v. *United States,* 362 U. S. 257, should not be read as warranting a different result. Indeed that decision is consistent with the view that an individual must have a personal or private right in the premises in order to maintain that a search of the premises invaded his personal Fourth or Fifth Amendment rights. In *Jones* the defendant was tried for and convicted of possession of narcotics. Prior to trial he moved to sup-

press narcotics and narcotics paraphernalia on the ground that the warrant pursuant to which this evidence was seized had been issued without probable cause. The defendant did not allege ownership of the seized items and the testimony on the motion to suppress revealed that the evidence was seized from an apartment belonging to a friend of the defendant who had given the defendant his own key to gain admission on the day of the search and was in the apartment at the time of the arrest and search. The lower federal courts had held that the defendant lacked standing to suppress the evidence since he had not alleged ownership of the property seized and was at most a guest or invitee in the apartment. This Court held that the defendant did have standing to object to the search and vacated the conviction.

The Court's reasoning began with the assumption that "restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and security of property" and, accordingly, that anyone objecting to a search must establish "that he himself was the victim of an invasion of privacy", 362 U. S. at p. 261. This prerequisite was not eliminated by other language in the *Jones* decision, as the Court below seemed to assume. Quite the contrary, this Court recognized that prosecutions for possessory crimes present a "special problem", 362 U. S. at p. 261, because of the dilemma facing an accused if he must allege ownership or a possessory interest in the property seized in order to make a prima facie showing of standing to object. Thus, the Court held that the necessity for demonstrating an interest in the property seized, "which is ordinarily required when standing is challenged", 362 U. S. at p. 263, must, in fairness to the defendant, be dispensed with in cases involving possessory crimes. This, of course, is the *holding* of *Jones*.

But the Court went on to observe that, even if *Jones* had not involved a possessory crime, the defendant had

established "the legally requisite interest in the premises" 362 U. S. at p. 263. The Court rejected prior lower court decisions which had resolved questions of the legally requisite interest in the premises by resorting to distinctions made in the common law of property between "guests", "invitees", "licensees", etc. The Court, thus, held that an individual could not be denied standing solely because his presence could be described by a common law property category of less than an owner. It is important, however, to emphasize that the Court did *not* hold that simple presence on the premises conferred standing in the absence of *any* personal or private interest in the premises. Indeed, to read the *Jones* case as so holding would be in conflict with the emphasis elsewhere in the opinion upon the necessity that a person have "a legally requisite interest in the premises", 362 U. S. at p. 261, in order to claim that a search of the premises violated his constitutional rights.

The crux of the *Jones* decision, insofar as the premises are concerned, is that someone who has been given the right to use an apartment for his personal use is entitled to the protection of the Fourth Amendment with respect to that apartment since a search of the apartment intrudes upon an area to which he has a personal right of privacy.

Accordingly, the Circuit Court was erroneous here in its apparent conclusion that "anyone legitimately on the premises" must be considered to have a personal right of privacy with respect to such premises. Such an interpretation is unfounded in law and makes little sense in practice. The rationale for requiring a legally requisite interest in the premises as a prerequisite to standing to object to a search is that, in order to have standing, an individual must demonstrate that his personal right of privacy was invaded—"that he himself was the victim of an invasion of privacy." 362 U. S. at p. 261. Surely the question of whether or not an individual has a personal right of privacy in the premises cannot depend, as the Court below

seemed to conclude, on whether or not he is actually present when the search occurs.

For example, if Jones' right of privacy in the premises were sufficient irrespective of what common law category is used to describe it, his absence at the time of the search could not have diminished his right of privacy in the premises or made the search any less an invasion of that right which is protected by the Fourth Amendment. Indeed this was the result in *United States* v. *Jeffers,* 342 U. S. 48, where it was held that evidence obtained, in the defendat's absence, from a hotel room which the defendant was permitted to use should be suppressed. And it was apparently concluded in *United States* v. *Lewis, supra,* that the defendant's personal privacy was not invaded notwithstanding his presence at the time of the "search". Similarly, in the case at bar, whatever right of privacy the respondent may have had could not have been changed, if, for example, the respondent had been at lunch or on a business call when the search occurred.

Thus the persistent emphasis by the Circuit Court on the respondent's actual presence at the time of the search is beside the point. It is based upon an out of context reading of part of the language of the *Jones* case and diverts attention from the real inquiry which should be a consideration of whether the respondent was the "victim", 362 U. S. at p. 261, of an unlawful search and seizure. In this context "victim" cannot mean, as the Circuit Court assumed, that the evidence was ultimately used against the respondent. On the contrary, a "victim" of an unlawful search is one who suffers an "invasion of privacy", 362 U. S. at p. 261, by virtue of the search. Moreover, to the extent that *Jones* can be read as condemning a search where its purpose is to gather evidence against a defendant and is "directed against" him in that sense, it no longer represents the law. *Warden* v. *Hayden,* 387 U. S. 294. Since it is now clear that a search does not violate an individual's right of privacy simply because its

purpose is to acquire evidence against him, *Jones* cannot be interpreted as meaning that such a purpose, as expressed in the "directed against" test, automatically results in an invasion of the defendant's privacy. Thus, a search should be considered "directed against" an individual only if it intrudes upon his personal privacy, rather than in terms of the intent of the police officers conducting the search. See, *infra*, pp. 14-16.

Finally, to read *Jones* as meaning that anything short of wrongful presence on the premises results in a constitutionally protected right of privacy in the premises would ignore the Court's command that the paramount purpose of the Fourth Amendment is to protect privacy rather than property. *Warden* v. *Hayden, supra.* If "legitimately on the premises" is the standard, the result would be to afford an individual constitutional protection against the invasion of property without regard to the objecting individual's personal interest in the property. As the District Court noted in the instant case (A. 28), such a test would mean that a janitor who is present when corporate books are seized could object if he had hidden incriminating evidence in them but that the president of the company who was not present at the time of the seizure could not object. In a case such as the one at bar, it would mean that the intrusion into the union offices violated the respondent's constitutional rights even though the respondent had no personal rights in the office or in the places searched or the items seized. Such a result would focus the inquiry on the intrusion or trespass on the property rather than on the objecting individual's personal rights in the property. This is precisely the kind of emphasis upon property condemned in both *Warden* v. *Hayden, supra,* and *Katz* v. *United States, supra,* and is not supported by prior decisions of the Court. On the contrary, considering the relationship of the respondent to the premises searched and property seized, *cf., Katz* v. *United States, supra,*

United States v. *Lewis, supra,* there is no plausible basis to conclude that the respondent's Fourth Amendment rights were violated by the search and seizure in the instant case and sound reasons for not adopting the view of the Circuit Court here extending the Fourth Amendment to encompass the respondent's claim.

POINT II

New rules of standing in Fourth Amendment cases should not be enunciated on habeas corpus review of the respondent's final state court judgment of conviction especially since the respondent's trial occurred prior to the decision in *Mapp* v. *Ohio*.

As we have shown, a holding that the respondent's personal Fourth Amendment rights were violated by the search and seizure in this case would represent a new rule of standing under the Fourth Amendment. Such a significant departure from prior Fourth Amendment rules and the enunciation of a new and extensively broadened rule of standing dealing with corporate or union records, like any other new Fourth Amendment rule, should not be made on collateral attack so as to apply retrospectively to final state court judgments of convictions. *Angelet* v. *Fay,* 381 U. S. 643.

Moreover, the rationale for prospective application of new search and seizure rules stated in *Linkletter* v. *Walker,* 381 U. S. 618, should preclude this respondent from raising any claim under *Mapp* v. *Ohio, supra.* The respondent was sentenced on June 21, 1960, and *Mapp* was decided on June 19, 1961. He raised the search and seizure claim now presented on his appeal to the Appellate Division, Second Department, and on his appeal to the New York Court of Appeals, both of which courts held that no personal rights of the respondent were violated by the search and seizure. On October 14, 1963

this Court denied certiorari to review the precise search and seizure claim which the Circuit Court, four years later, concluded was, after all, a valid claim. Consideration of his claim on direct appeal was a result of the fundamental principle that a case in the direct appellate process when a change in the law occurs should be decided according to the new law. *United States* v. *The Schooner Peggy,* 5 U. S. (1 Cranch) 102. Indeed, on the basis of this principle, the Court has applied *Mapp* to cases which were in the direct appellate process when *Mapp* was decided and which reached the Court in the direct appellate process. *Ker* v. *California,* 374 U. S. 23; *Fahy* v. *Connecticut,* 375 U. S. 85; *Stoner* v. *California,* 376 U. S. 483. However, when certiorari was denied this case passed from the direct appellate process, *Linkletter* v. *Walker, supra,* at p. 622 N. 5, and the respondent should no longer be entitled to invoke this principle in collateral attacks such as the one at bar.

Neither *Linkletter* nor *Tehan* v. *Shott,* 382 U. S. 406, involved the availability and scope of federal habeas corpus to persons who, like the respondent, sought to take advantage of rules effective subsequent to their trial. However, decisions such as *Ker, Fahy* and *Stoner,* which applied new rules to cases still in the direct appellate process when they reached the Court, are assumed to have "established without discussion", *Johnson* v. *New Jersey,* 384 U. S. 719, at p. 732, that new search and seizure rules would be applicable on habeas corpus to cases still in the direct appellate process when the rules were enunciated. Of course, there is nothing inevitable about such a conclusion. On the contrary, it would be logical to provide that new rules announced while a person was in the direct appellate process would be applied to his appeal under the principle of *The Schooner Peggy,* but that on collateral attack the applicability of such new rules should be limited to trials which began subsequent to the date of decisions announcing such rules. *Johnson*

v. *New Jersey, supra; Stovall* v. *Denno,* 388 U. S. 293. Indeed, the date of trial as the cut-off date is particularly appropriate in cases dealing with evidentiary matters since such a rule would not penalize the People because the prosecution offered and the judge admitted evidence which was admissible as of the date of the trial.

There is no inherent reason why *Mapp* should be more broadly retrospective on collateral attack than cases involving statements taken in the absence of counsel and introduced in evidence at trial, *Johnson* v. *New Jersey, supra,* or than testimony regarding pre-trial identifications, *Stovall* v. *Denno, supra.* And the respondent should, accordingly, be entitled to no broader consideration on collateral attack than a habeas corpus applicant who had completed the appellate process before *Mapp* was decided.

CONCLUSION

For the foregoing reasons, the order of the Circuit Court of Appeals should be in all respects reversed.

Dated: New York, New York, March 6, 1968.

Respectfully submitted,

Louis J. Lefkowitz
Attorney General of the
State of New York
Attorney for Petitioner

Samuel A. Hirshowitz
First Assistant Attorney General

Michael H. Rauch
Assistant Attorney General
of Counsel

SUPREME COURT, U. S.

APR 8 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 844

VINCENT R. MANCUSI, Warden of Attica State Prison, Attica, New York,

Petitioner,

against

FRANK DEFORTE,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT

JAMES L. LEKIN,
Attorney for Respondent,
815 Liberty Bank Building,
Buffalo, New York 14202,
Telephone: 856-5400.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

TABLE OF CONTENTS.

	PAGE
Preliminary Statement	1
Question Presented	1
Statement of the Case	2
Summary of Argument	4
POINT I. Under *Jones v. United States,* respondent has standing to challenge the illegal search and seizure of union books and records	7
A. *Jones v. United States* and the standing requirement	7
B. *Jones v. United States* applies to respondent	10
1. Respondent was the "victim" of the illegal search and seizure	10
2. Respondent was legitimately on the premises when the illegal search and seizure occurred	12
POINT II. The personal nature of the Fourth Amendment is not violated by affording respondent standing	17
POINT III. Fifth Amendment rights need not be violated in order for the Fourth Amendment to prevail	19
POINT IV. *Silverthorne Lumber Co. v. United States* precludes the use against respondent of the illegally seized union books and records	21
CONCLUSION	26

CASES.

	PAGE
Adams v. People of State of New York, 192 U. S. 585	15
Berger v. State of New York, 388 U. S. 41	5, 9, 14
Boyd v. United States, 116 U. S. 616	6, 20
Coffey v. Fay, 344 F. 2d 625 (2nd Cir. 1965)	9
Elkins v. United States, 364 U. S. 206	25
Go Bart Importing Co. v. United States, 282 U. S. 344	14
Gouled v. United States, 255 U. S. 298	15, 16

PAGE

Henzel v. United States, 296 F. 2d 650 (5th Cir. 1961) .10, 17
In re Dooley, 48 F. 2d 121 (2nd Cir. 1931) 23, 24, 25
Jones v. United States, 362 U. S. 257 ....3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 23
Katz v. United States, 36 U. S. L. Week 4080 (U. S. December 19, 1967) 14, 17
Ker v. California, 374 U. S. 23 9
Lagow v. United States, 159 F. 2d 245 (2nd Cir. 1946) 24
Linkletter v. Walker, 381 U. S. 618 .....4, 7, 20, 25
Malloy v. Hogan, 378 U. S. 1 20
Mapp v. Ohio, 367 U. S. 643 .....3, 4, 6, 7, 20, 25
People v. DeGrandis, *et al.*, 16 A. D. 2d 834, 228 N. Y. S. (2d 875 (2d Dept. 1962); affirmed, 12 N. Y. 2d 812, 187 N. E. 2d 130 (1962); amended remittitur, 12 N. Y. 2d 946, 188 N. E. 2d 794 (1963); cert. denied 375 U. S. 868 3
Schmerber v. California, 384 U. S. 757 .....6, 20, 21
See v. City of Seattle, 386 U. S. 541 14
Silverman v. United States, 365 U. S. 505 15
Silverthorne Lumber Co. v. United States, 251 U. S. 385 .....6, 7, 14, 15, 16, 21, 22, 23, 24, 25, 26
United States v. Antonelli Fireworks Co., 155 F. 2d 631 (2nd Cir. 1946) 24
United States v. Birrell, 242 F. Supp. 191 (S. D. N. Y. 1965) affirmed on reargument, 243 F. Supp. 36 (1965) 5, 9, 17, 24
United States v. Cooper, 288 F. 604 (Iowa 1923); 9 F. 2d 216 (8th Cir. 1925) 24
United States v. DeVasto 52 F. 2d 26 (2nd Cir. 1931) cert. denied 284 U. S. 678 25
United States v. Fago, 319 F. 2d 791 (2nd Cir. (1963), cert. denied 375 U. S. 900 24
United States v. Guterma, 272 F. 2d 344 (2nd Cir. 1959) 25
United States v. Kanan, 255 F. Supp. 711 (D. C. Arizona 1963); 241 F. 2d 509 (9th Cir. 1965) 17
United States v. White, 322 U. S. 694 .....6, 18, 19
Warden v. Hayden, 387 U. S. 294 .....5, 15, 17, 20
Weeks v. United States, 232 U. S. 383 15
Wilson v. United States, 221 U. S. 361 .....6, 18, 19
Wong Sun v. United States, 371 U. S. 471 10

Constitutional and Statutory Provisions.

PAGE

Constitution of the United States:
Amendment IV 3, 4, 6, 7, 8, 10, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26
Federal Rules of Criminal Procedure:
Rule 41(e) 8
Title 28 United States Code:
§ 2254 3
New York Penal Law:
Former § 530 2
Former § 580 2
Former § 850 2
Former § 851 2

Miscellaneous.

33 *Brooklyn Law Review* 70, Comment, "Books, Records and the Privilege Against Self-Incrimination" (1966) 19
1967 *Duke Law Journal* 366, Comment, "Supreme Court Delinates the Relationship between the Fourth and Fifth Amendments." 20
12 *U. C. L. A. Law Review* 857, Comment, "The Fourth and Fifth Amendments—Dimensions of an 'Intimate Relationship'" (1966) 20
34 *University of Chicago Law Review* 342, Comment "Standing to Object to an Unreasonable Search and Seizure" (1967) 7, 13
1965 *Washington U. L. Q.* 488, Comment, "Standing to Object to an Unlawful Search and Seizure" 7

IN THE

Supreme Court of the United States

October Term, 1967

No. 844

VINCENT R. MANCUSI, Warden of Attica State Prison, Attica, New York,

Petitioner,

against

FRANK DEFORTE,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT

Preliminary Statement

Respondent adopts the material in Petitioner's brief under the headings "Opinions Below", "Jurisdiction", and "Constitutional Provisions"

Question Presented

Whether respondent, a Vice President of Local 266 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, had "standing" to object to the use of various union books and records

against him in a criminal prosecution, which were admittedly illegally seized from the union's office by State officials over respondent's protest?

Statement of the Case

Respondent was Vice President of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America[1] in Nassau County, New York. Along with two other officers[2] of Local 266, respondent was indicted by the Nassau County Grand Jury for Conspiracy (N. Y. Penal Law § 580), Coercion (N. Y. Penal Law § 530) and Extortion (N. Y. Penal Law § 850 and 851)[3].

On March 13, 1959 and prior to indictment, a subpoena *duces tecum* (A. 22) was issued to Local 266 by the Nassau County District Attorney's Office, commanding the production of certain union books and records before the District Attorney, Nassau County, Mineola, New York. Respondent refused to comply with the subpoena when it was served upon him at the office of Local 266.

Upon refusal of respondent to comply with the subpoena, and dispite the absence of a search warrant, the State authorities then searched the premises and seized the union books and records over the protest of respondent. The State, without any reservation whatsoever, has admitted the illegality of the search and seizure[4] (A. 24 and 31).

---

[1] Hereinafter called Local 266.

[2] Twelve other defendants were also indicted.

[3] It was alleged there was a criminal conspiracy to eliminate and restrict competition amongst the various owners of juke boxes in the New York area, by exacting illegal fees in the form of dues and assessments.

[4] The only issue is the standing of respondent to object to the illegal search and seizure.

Respondent made a substantial portion of the entries in the books and records, as well as having participated in the preparation of the records (A. 51). Most of these same books and records of Local 266 which were illegally seized were introduced into evidence at trial over objection[5] (A. 52).

Trial in Nassau County resulted in a conviction of respondent[6] before a jury, and he was sentenced for a term of three (3) to five (5) years in State Prison on June 21, 1960.[7]

The illegal search and seizure question was unsuccessfully raised by respondent through State Court appeals[8]. Pursuant to the requirements of 28 U. S. C. 2254, all available State remedies have been exhausted.

While serving his prison sentence in Attica State Prison, Attica, New York, respondent filed a prison made petition for Writ of *Habeas Corpus* in the United States District Court for the Western District of New York.[9] This application was denied upon the grounds that the standards of *Jones v. United States,* 362 U. S. 257, did not apply to non-possessory crimes and the personal nature of the Fourth Amendment was being ignored.

---

[5] Brief for Petitioner, p. 4.

[6] As well as the other two officers.

[7] Respondent began to serve his sentence when State appeal procedures were exhausted.

[8] *People v. DeGrandis, et al.,* 16 A. D. 2d 834, 228 N. Y. S. 2d 875 (2d Dept. 1962); affirmed without opinion, 12 N. Y. 2d 812, 187 N. E. 2d 130 (1962); amended remittitur, 12 N. Y. 2d 946, 188 N. E. 2d 794 (1963), cert. denied 375 U. S. 868. In essence, the State Courts held *Mapp v. Ohio,* 367 U. S. 643, inapplicable because no individual right of respondent was violated.

[9] Respondent previously had been denied Federal *Habeas Corpus* relief on the allegation that the jury had been coerced. 335 F. 2d 173 (2nd Cir. 1964).

On appeal, the United States Court of Appeals for the Second Circuit reversed and ordered the issuance of the Writ of *Habeas Corpus*. The Court concluded that *Jones v. United States, supra,* did apply; that accordingly, respondent was the victim of the illegal search and seizure; and his privacy had been invaded (A. 33-44).

Motions for rehearing (A. 46) and rehearing in banc (A. 47) were denied, and respondent was unconditionally released pending further hearing to this Court (A. 48-49).

Summary of Argument

I. A. The Fourth Amendment prohibits unlawful searches and seizures by state officials. *Mapp v. Ohio,* 367 U. S. 643. *Linkletter v. Walker,* 381 U. S. 618, 622 affirmed *Mapp,* limiting the exclusionary rule to State Court convictions which had not become "final" before the rendition of *Mapp.* Respondent's judgment of conviction was not finally affirmed until after *Mapp* had been decided and therefore, he was entitled to the exclusionary rule if standing existed. *Jones v. United States,* 362 U. S. 257 established guidelines as to who can raise the Fourth Amendment to exclude illegally seized evidence. According to *Jones,* one need not own the searched premises or seized evidence in order to gain standing. Rather, the person seeking suppression must be the (1) "victim, *i.e.,* against whom the search is directed and (2) "anyone legitimately on the premises where a search occurs may challenge its legality." 362 U. S. at 261-67.

B. *Jones* applies to respondent for the following reasons:

1. Respondent was the "victim" of the unlawful search and seizure. There can be little doubt that the search was

directed at respondent. As an officer of Local 266, the authorities had to prosecute respondent in order to extinguish the alleged illegal activities of Local 266. "Monitors" had been placed on the phones of Local 266 to gain information about respondent. The local was never indicted or fined and in fact, never commenced operation again after the conviction of respondent and his fellow officers. Thus, respondent, and not Local 266, was the victim of the search and seizure.

2. According to *Jones*, "even were this not a prosecution turning on illicit possession (which by itself convicts) the legally requisite interest in the premises was here satisfied * * *(A)nyone legitimately on the premises where a search occurs may challenge its legality." 362 U. S. at 263-67. By implication, *Jones* also rejected the former strict tests of standing in the property seized. *United States v. Birrell*, 242 F. Supp. 191 (S. D. N. Y. 1965).

As an officer of Local 266, respondent was legitimately on the premises and objected to the illegal search and seizure. He also contributed substantially to the actual preparation of the books and records and spent a great deal of each working day in the office.

While respondent did not own the premises, his place of business was in the office of Local 266 and as such, he is entitled to protection from an illegal search and seizure. *Berger v. State of New York*, 388 U. S. 41. Because respondent was the victim and he was legitimately on the premises, his privacy was invaded. *Jones v. United States, supra; Warden v. Hayden*, 387 U. S. 294. As a result of the State's arbitrary action, respondent has standing to suppress the illegal seizure of union books and

records even though he did not own the premises or the books and records.

II. The issue in this case does not relate to the Fifth Amendment, but rather to the Fourth Amendment. Petitioner's relies on *United States v. White,* 322 U. S. 694, and *Wilson v. United States,* 221 U. S. 261, to support the conclusion that respondent has no "personal privilege" under the Fourth or Fifth Amendments with respect to union books and records. These cases deal only with the right of an officer to refuse production of corporate or union records in response to a lawfully issued subpoena. In the instant case, an unlawful search and seizure occurred and as such, respondent's Fourth Amendment rights were violated. Since respondent qualifies under *Jones,* he can assert the Fourth Amendment.

III. Respondent, as discussed, has not relied on the protection of the Fifth Amendment. Rather, respondent seeks suppression because the Fourth Amendment prohibits illegal actions conducted by the State authorities. While there may be "an intimate relationship" between the Fourth and Fifth Amendments, *Boyd v. United States,* 116 U. S. 616, 633, "the philosophy of each Amendment is complementary, although not dependent upon that of each other." *Mapp v. Ohio,* 367 U. S. 643, 651. Therefore, even though there may have been no Fifth Amendment right to seek suppression, the Fourth Amendment standing alone protects respondent. *Schmerber v. California,* 384 U. S. 757.

IV. Notwithstanding, the development of the Fourth Amendment, as early as 1920, it was recognized that an illegal seizure of corporate paper precluded usage against the officers of the corporation. *Silverthorne Lumber Co.*

v. United States, 251 U. S. 385. Even though the same books and records could have been lawfully subpoenaed, the illegal action of the Government prevented such usage as evidence. *Mapp* brings the force of *Silverthorne, supra,* to bear upon the States and therefore, *Silverthorne* is additional authority to support decision of the Court of Appeals.

POINT I

Under *Jones v. United States,* Respondent has standing to challenge the illegal search and seizure of Union Books and Records.

A.

***Jones v. United States,* and the standing requirement.**

While the Fourth Amendement[10] excludes illegally seized evidence, the standing requirement, that is the right or privilege to assert the Fourth Amendment, has not permitted the exclusionary rule to be applied to everyone.[11]

---

[10] *Mapp v. Ohio,* 367 U. S. 643, applied the Fourth Amendment to the States; *Linkletter v. Walker,* 381 U. S. 618, reaffirmed *Mapp,* limiting the exclusionary rule to State Court convictions which had not become "final" before the rendition of *Mapp.* "By final, we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Mapp v. Ohio.*" 381 U. S. at 622, Footnote 5. Respondent's original appeal through petition for certiorari was not denied until October, 1963, considerably after *Mapp* had been decided. Thus, if standing existed, respondent is entitled to the exclusionary rule. As will be seen throughout this brief, new rules of standing have not been created and therefore, *habeas corpus* relief is entirely proper.

[11] See Comment, *Standing to Object to an Unreasonable Search and Seizure,* Volume 34 University of Chicago Law Review 342, 343 Footnote 8 (1967), for reference to various commentaries on the standing requirement; See Comment, *Standing to Object to an Unlawful Search and Seizure,* 1965, Wash. U. L. Q. 488, 489, Footnote 5 citing cases prior to *Jones v. United States.*

Jones v. United States, 362 U. S. 257, re-examined the standing requirement and set forth criteria for determining who could raise the Fourth Amendment to exclude illegally seized evidence.

The defendant in *Jones* was charged with the unlawful possession of narcotics, the possession of which was sufficient to convict. Federal agents had found narcotics hidden in an apartment, where defendant was a guest. Jones sought suppression of the seized narcotics under Rule 41(e)[12] of the Federal Rules of Criminal Procedure. The Government argued that defendant did not allege ownership of the seized articles or an interest greater than that of an invitee or guest in the searched apartment. Reversing the conviction, the Court held:

> (1) Where possession both convicts and confers standing, defendant need not make a preliminary showing of an interest in the premises searched or property seized.
>
> (2) Defendant's presence in the apartment made out a sufficient interest in the premises to constitute him a "person aggrieved" by the search.

Speaking for a unanimous Court, Mr. Justice Frankfurter stated:

---

[12] Rule 41(e) provides in part: "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. * * *"

> "In order to qualify as a 'person aggrieved[13] by an unlawful search and seizure' one must have been the victim of a search and seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." 362 U. S. at 261.

After discussing the "dilemma"[14] of a defendant charged with possession of narcotics and at the same time being required to claim an interest in the premises or evidence, the Court declined to limit its holding to this situation and specifically stated:

> "(E)ven were this not a prosecution turning on illicit possession, the legally requisite interest in the premises[15] was here satisfied, for it need not be as extensive a property interest as was required by the courts below." 362 U. S. at 263.

The Court emphasized that technical property concepts "ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards."[16] Thus, "anyone legitimately on the premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him."[17]

---

[13] The constitutionality of a search and seizure is governed by Federal standards. *Jones* presumably governs standing to suppress evidence in a State Court prosecution because basic constitutional principles are involved. *Coffey v. Fay,* 344 F. 2d 625, 628 (2nd Cir. 1965). See also *Ker v. California,* 374 U. S. at 36; see dissent of Mr. Justice Harlan in *Berger v. State of New York,* 388 U. S. at 102.

[14] It was concluded that when possession convicts, no preliminary showing of standing need be asserted. 362 U. S. at 262-264.

[15] See *United States v. Birrell,* 242 F. Supp. 191, 198 (S. D. N. Y. 1965) "*Jones* rejected the former strict tests (of standing) as to the property interest in the premises searched and, at least by implication, in the *property seized*" (emphasis added).

[16] 362 U. S. at 266.

[17] 362 U. S. at 267.

The *Jones* ruling liberalized the standing requirement liberated it from property law concepts. *Wong Sun v. United States*, 371 U. S. 471, subsequently approved *Jones* but without lengthy discussion. There is no doubt that subsequent to *Jones* a defendant need not own the seized evidence or searched premises. *Jones* abandoned fiction to reflect the intention and spirit of the Fourth Amendment.

B.

***Jones v. United States*, applies to respondent.**

The guidelines[18] of *Jones* have never been fully explored by this Court since the case was decided. The two tests set forth in *Jones* require that the party seeking suppression must be the (1) "victim" and (2) anyone legitimately on the premises may object to the search and seizure.

1. Respondent was the "victim" of the illegal search and seizure.

According to *Jones*:

> "The restrictions upon searches and seizures were obviously designed for the protection against official invasion of privacy and security of property. They are not exclusionary provisions against the admissions of kinds of evidence deemed inherently unreliable or prejudicial. The exclusion in federal trials of evidence otherwise competent but gathered by federal officers in violation of the Fourth Amendment is a means for making effective the protection of privacy.

[18] In the instant case, Judge Kaufman noted that while *Jones* informs what is not required to confer standing, the Supreme Court has avoided formulating any specific rules for determining what is required. 379 F. 2d at 902; see also *Henzel v. United States*, 296 F. 2d 650, 652 (5th Cir. 1961).

> Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim[19] of an invasion of privacy." 362 U. S. at 261.

Unquestionably, respondent was the "victim" of the illegal search and seizure, that is, against whom the search was directed. Complaints had been made by disgruntled persons concerning the alleged improper activities of respondent. "Monitors" had been placed on the phones of Local 266 to gather information and a general investigation was conducted regarding the activities of respondent and his fellow union officers. Moreover, the District Attorney was required to prosecute respondent to effectively curtail the activities allegedly perpetrated under the guise of Local 266, an unincorporated association. Local 266 was never indicted, prosecuted or even fined. If the officers were imprisoned, as they were, Local 266 would wither and die unless succeeding parties attempted to carry on the alleged illegal activities. This never happened. By imprisoning the officers, including respondent, the State extinguished the Union's activities, and thereby accomplished its ultimate purpose.

In reality, respondent, not Local 266,[20] was the "victim" of the search and seizure. In treating the victim ration-

---

[19] By "victim" is meant one against whom the search was directed as distinguished from one who is prejudiced. 362 U. S. at 261.

[20] The State argued before the District Court and Court of Appeals that Local 266 was the "victim" rather than respondent because the State's investigation was directed at the Union. The Court of Appeals strongly felt otherwise. "While the State insists that the search and seizure were conducted against Local 266, we would be blind to reality if we did not recognize that the action by the State officials was actually 'directed' at DeForte." 379 F. 2d at 902 (A. 39).

ale, Justice Frankfurter was plainly cognizant of a violation of privacy.[21] Thus, the first requirement of *Jones* is convincingly "established"[22] by respondent.

2. Respondent was legitimately on the premises when the illegal search and seizure occurred.

In further discussing the standing requirement of *Jones*, Mr. Justice Frankfurter specifically stated:

> "Even were this not a prosecution turning on illicit possession, the legally requisite interest in the premises was here satisfied, for it need not be as extensive a property interest as was required by the courts below." 362 U. S. at 263.

In reference thereto, the Court then noted:

> "As a second[23] ground sustaining 'standing' here we hold that petitioner's testimony on the motion to suppress made out sufficient interest in the premises to establish him as a person aggrieved by the search." 362 U. S. at 265.

The Court refuted technical distinctions previously developed in lower courts[24] and concluded:

---

[21] 362 U. S. at 261.

[22] 362 U. S. at 261.

[23] The first ground was that where possession convicts and confers standing, there need be no showing of an interest in the premises searched or property seized. 362 U. S. at 263.

[24] "While this Court has never passed upon the interest in the searched premises necessary to maintain a motion to suppress, the Government's argument closely follows the prevailing view in the lower courts. They have denied standing to 'guests' and 'invitees' [citing cases] and employees, who though in 'control' or 'occupancy' lacked 'possession [citing cases]. The necessary quantum of interest has been distinguished as being, variously, ownership in or right to possession of the premises' [citing cases], the interest of a 'lessee

(Footnote continued on following page)

> "No just interest of the Government in the effective and rigorous enforcement of the criminal law will be hampered by recognizing that anyone legitimately on premises[25] where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him. This would of course not avail those who, by virtue of their unlawful presence, cannot invoke the privacy of the premises searched."[26]

Not only was respondent the "victim" of the search and seizure, he furthermore had a "sufficient interest" in the premises searched and the property seized to establish him as a "person aggrieved" by the search and seizure. Respondent prepared much of the material contained in the books and records of Local 266, which were seized in

---

(Footnote continued from preceding page)

or licensee' [citing cases], or of one with 'dominion' [citing cases]. We do not lightly depart from this course of decisions by the lower courts. We are persuaded, however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. Even in the area from which they derive, due consideration has led to the discarding of these distinctions in the homeland of the common law. See Occupiers' Liability Act. 1957, 5 and 6 Eliz. 2, c. 31 carrying out Law Reform Committee, Third Report, Cmd. 9305. Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards." 362 U. S. at 265-66.

[25] Counsel for the respondent suggests that because the Fourth Amendment is based on deterrence rather than self incrimination, a complete examination of the "on the premises" test and the *standing* requirement may be in order. This was suggested in oral argument before the Court of Appeals. See Comment, *Standing to Object to an Unreasonable Search and Seizure,* 34 University of Chicago Law Review 342, 1967.

[26] Because Jones was in the apartment with the consent of the lawful occuppier, he was entitled to suppression even though he did not own the premises. 362 U. S. at 267.

the union office. He co-signed all checks. Respondent spent a considerable amount of each working day in the union office. As an officer of Local 266, he was legitimately on the premises and objected to the search and seizure.

Admittedly, the search and seizure occurred on the premises of Local 266, and these premises were not owned by respondent; however, respondent's place of business and operation was in the offices of Local 266. The Fourth Amendment protects not only the security of the home but a person's place of business. *Berger v. State of New York*, 388 U. S. 41; *Go Bart Importing Co. v. United States*, 282 U. S. 344; *Silverthorne Lumber Co. v. United States*, 251 U. S. 385. As recently as *See v. City of Seattle*, 386 U. S. 541, 543, this Court stated: "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *Jones* does not require ownership of the premises or the seized property, and therefore, the Fourth Amendment protects respondent in the privacy of the union office.[27]

Accordingly, respondent was the (1) "victim" of the search and seizure and (2) he had an interest in the premises searched and the property seized. In either instance, respondent's privacy was invaded.

Petitioner, however, argues that all of the foregoing is irrelevant because (1) respondent did not own the seized books and records or searched premises, and therefore, had no personal interest which can be protected, (2) the "directed against" or "victim" standard is irrational in

---

[27] See *Katz v. United States*, 36 U. S. L. Week 4080 (U. S. December 19, 1967) for observation of what is a "constitutionally protected area."

this instance and (3) there was no invasion of respondent's personal privacy.

If respondent had been the legal owner of the books and records, the Fourth Amendment would unquestionably protect him. Presumably, the same rationale would apply to his legal ownership of the premises. Correspondingly, petitioner requests that this Court return to property law concepts of ownership in order to establish a "personal interest" in the property seized or premises searched which can be protected. This position is difficult to reconcile with language and holding of *Jones*.

Strict property concept no longer control the Fourth Amendment and the actual ownership of the books and records or premises becomes irrelevant. Aside from *Jones*, this is also apparent in *Warden v. Hayden*, 387 U. S. 294, 304-305:

> "We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts. (Citing *Jones v. United States, id.* and *Silverman v. United States*, 365 U. S. 505, 511.) This shift in emphasis from property to privacy has come about through a subtle interplay of substantive and procedural reform * * *[28] In determining whether someone

---

[28] "The remedial structure at the time even of *Weeks v. United States*, 232 U. S. 383, was arguably explainable in property terms. The Court held in *Weeks* that a defendant could petition *before* trial for the return of his illegally seized property, a proposition not necessarily inconsistent with *Adams v. People of State of New York*, 192 U. S. 585, which held in effect that the property issues involved in search and seizure are collateral to a criminal proceeding. The remedial structure finally escaped the bounds of common law property limitations in *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 and *Gouled v. United States supra*, when it became established that suppression might be sought during a criminal trial, and under circumstances which would not sustain

(Footnote continued on following page)

> is a 'person aggrieved by an unlawful search and seizure' we have refused to import into the law * * * subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." (Citing *Jones v. United States.*)

Furthermore, it is incorrect and unnecessary to suggest, as petitioner does,[29] that the union books and records became respondent's private records by virtue of the unlawful seizure. Ownership is not necessary to establish an "interest" in the premises or property and this position is hardly compatable with the philosophy of the Fourth Amendment and *Jones.*

It is therefore apparent that ownership of the searched premises or seized property is not controlling. It is also evident that there is no reason why *Jones* should not apply in this instance and that as a result, the "victim" test is pertinent. The result of the state's illegal activities is a plain violation of respondent's privacy, which requires suppression. The intangible rather than the tangible has been violated for "the Fourth Amendment protects peo-

---

(Footnote continued from preceding page)

an action in trespass or replevin. Recognition that the role of the Fourth Amendment was to protect against invasions of privacy demanded a remedy to condemn the seizure in *Silverthorne,* although no possible common law claim existed for the return of the copies made by the Government of the papers it had seized. The remedy of suppression, necessarily involving only the limited, functional consequence of excluding the evidence from trial, satisfied that demand.

The development of search and seizure law since *Silverthorne* and *Gouled* is replete with examples of the transformation in substantive law brought about through the interaction of the felt need to protect privacy from unreasonable invasions and the flexibility in rulemaking made possible by the remedy of exclusion." 387 U. S. at 304-305.

[29] See p. 14 of Petitioner's Brief.

ple, not places * * * Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." *Katz v. United States*, 36 U. S. L. Week at 4081 (U. S. December 19, 1967). See also *Warden v. Hayden, supra*. *Jones* teaches that the morass of property technicality is no longer controlling and these principles have been applied to similar and comparable situations by lower Courts.[30] *Jones* has not been expanded to cover an unanticipated area and the Court of Appeals has not departed from prior decisions of this Court.

POINT II

The personal nature of the Fourth Amendment is not violated by affording Respondent standing.

From the very inception of this proceeding, the State has argued and does now,[31] that respondent had no "personal privilege" under the Fourth or Fifth Amendments in

---

[30] See *Henzel v. United States*, 296 F. 2d 650 (5th Cir. 1961) and discussed at length at A. 22. Also in *United States v. Birrell*, 242 F. Supp. 191 (S. D. N. Y. 1965); affirmed on reargument, 243 F. Supp. 36 (1965), defendant was charged with violations of the Securities Act of 1933 and other criminal acts. Birrell was involved with a number of corporations. Many of the corporate books and records were deposited with a third party when a search and seizure occurred. "The Government urges that Birrell is not a 'person aggrieved' * * * and therefore, has no standing * * * The argument for the Government is that Birrell had no property interest in the premises searched, and that the papers seized include 'corporate books and records', * * * which must belong to various corporations * * * It seems clear to me that Birrell does have such an interest even in the 'corporate books and records' as to make him a 'person aggrieved'." 242 F. Supp. at 198. The Court concluded the search was directed at Birrell and *Jones* applied. See *United States v. Kanan*, 225 F. Supp. 711 (D. C. Arizona 1963); 341 F. 2d 509 (9th Cir. 1965).

[31] See p. 12 of Petitioner's Brief.

the union records, relying on *United States v. White*, 322 U. S. 694, and *Wilson v. United States*, 221 U. S. 361. At the same time, the state has always admitted the illegality of the search and seizure. By advancing the foregoing, the state attempts to mask its illegality by repeatedly asserting that a lawful subpoena *duces tecum* was issued and that a union officer has no constitutional right to refuse, on the grounds of self incrimination, to produce books and records when faced with a lawful subpoena *duces tecum*. In the same vein, petitioner asserts no "personal rights" of respondent were violated by the search of the union offices.[32]

In *Wilson*, a *lawful subpoena duces tecum* was issued to the United Wireless Telegraph Company and served upon the company through Wilson, its president. Wilson declined to deliver to the Grand Jury the books requested upon the grounds that "the matters therein might incriminate him" and that consequently the Fourth Amendment was being violated. In ordering production of the books, the Court at length discussed the Fifth Amendment and concluded that Wilson could not avail himself of the defense of *self-incrimination* when corporate books were involved, in response to a lawful subpoena.

In *White*, the Grand Jury issued a subpoena *duces tecum* to Local 452 of the International Union of Operating Engineers, for the production of books and records. The subpoena was *lawfully* served upon the President of the Union and he declined to produce the books and records upon the ground that the Fourth and Fifth Amendments protected him. The Court held otherwise and stated that "neither the Fourth nor the Fifth Amendment * * * re-

[32] See pages 7, 8 and 17 of Petitioner's Brief. This argument has been treated by respondent at pages 14-17 of Respondent's Brief.

quires the recognition of a practice against self-incrimination under the circumstances of this case". (Emphasis added 322 U. S. at 698.)

It is clear, therefore, that *White* and *Wilson* deal only with the right of a union or corporate officer to refuse upon the ground of *self-incrimination* to submit union or corporate books and records pursuant to a *validly issued* subpoena *duces tecum*.[33] These cases in no way whatsoever address themselves to the question presently before the Court, *i.e.* the right of a union officer to raise the Fourth Amendment when there has been an *admitted illegal search* and *seizure*. *White* and *Wilson*, therefore, do not support the conclusion that respondent cannot assert the Fourth Amendment.

The issue in this case does not relate to self-incrimination but specifically to an admitted, unlawful, unreasonable search and seizure in direct violation of the Fourth Amendment. The personal nature requirement, whatever, that may be, of the Fourth Amendment does not rest on ownership of property. Instead, if respondent is the victim, as he was, and if his privacy was invaded, as it has been, then the Fourth Amendment protects respondent.

POINT III

Fifth Amendment rights need not be violated in order for the Fourth Amendment to prevail.

As previously noted, a union or corporate officer has no constitutional privilege to refuse on the grounds of self incrimination to produce corporate or union books and records under a lawful subpoena *duces tecum* and respondent has never asserted that suppression is based upon the

---

[33] See Comment, *Books and Records and the Privilege Against Self-Incrimination*, 33 Brooklyn Law Review 70 (1966).

Fifth Amendment. Rather, suppression is predicated upon the Fourth Amendment which prohibits unlawful searches and seizures. At this point, the relationship of the Fourth and Fifth Amendments bears examination.[34]

Commencing with *Boyd v. United States*,[35] 116 U. S. 616, it was concluded that there was an intimate relationship between the Fourth and Fifth Amendments. In *Mapp v. Ohio, supra*, this "intimate relationship" was recognized. Mr. Justice Clark pointed out that "the philosophy of each amendment (*i.e.*, the Fourth and Fifth Amendments) and each freedom is complementary to, although not dependent upon, that of each other in its sphere of influence."[36] Thus, the exclusionary rule flows from the Fourth Amendment.[37]

Similarly in *Schmerber v. California*,[38] 384 U. S. 757 this Court considered the Fourth Amendment as separate and

---

[34] See Comment, *The Fourth and Fifth Amendments—Dimensions of an "Intimate Relationship"*, 13 U. C. L. A. Law Review 857 (1966); also comment, *Constitutional Law! Supreme Court Delineates the Relationship between the Fourth and Fifth Amendments*, 1967 Duke Law Journal 366.

[35] 116 U. S. at 633. "We have already noticed the intimate relation between the two amendments * * * For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in a criminal case is condemned in the Fifth Amendment * * *"

[36] 367 U. S. at 651.

[37] See concurring opinion by Mr. Justice Black, 367 U. S. at 661, and dissenting opinion by Mr. Justice Harlan at 367 U. S. at 685; see also *Malloy v. Hogan*, 378 U. S. 1; *Linkletter v. Walker*, 381 U. S. 618; *Warden v. Hayden*, 378 U. S. 294.

[38] Defendant was arrested for driving while intoxicated. Taken to a hospital, a physician extracted a blood sample from defendant at the direction of the arresting police officer. Defendant objected to this extraction. At the trial, the sample was admitted into evidence despite the assertation that the Fourth and Fifth Amendments had been violated. This Court held that the introduction of the sample was permissible and that neither the Fifth Amendment was violated because no communicative act was involved nor the Fourth Amendment was violated because there was sufficient cause to examine the defendant for intoxication.

distinct from the Fifth Amendment and recognized that a defendant may assert the protection of the Fourth Amendment in situations where there is no Fifth Amendment right. Even though respondent may not have asserted the Fifth Amendment, the propriety of a search and seizure, according to *Schmerber,* depends upon probable cause and reasonableness of the methods utilized in securing the evidence.[39] Since the State has always admitted the illegality of the search and seizure, the Fourth Amendment alone is sufficient to afford respondent his constitutional protection.

POINT IV

Silverthorne Lumber Co. v. United States precludes the use against Respondent of the illegally seized Union books and records.

It was argued by respondent before the Court of Appeals that *Silverthorne Lumber Co. v. United States,* 251 U. S. 385 also required suppression of the illegally seized books and records. While this argument was not examined by the Court of Appeals,[40] the *Silverthorne* rationale additionally represents a compelling argument for exclusion of the admitted illegally seized evidence.

In *Silverthorne* it was held that a corporation enjoys the rights granted by the Fourth Amendment to the same extent as an individual, and that corporate records unlawfully seized could not be used as evidence in a prosecution

---

[39] 384 U. S. at 768. "We begin with the assumption that once the privilege against self-incrimination has been found not to bar compelled intrusions into the body for blood to be analyzed for alcohol content, the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner."

[40] 379 F. 2d at 905, Footnote 12.

against the corporation. Furthermore, such illegally seized corporate records could not be used in a prosecution against the individual corporate officers. As in *Silverthorne,* the seizure of the union records in the present case is admittedly unlawful; and, as here, the government in *Silverthorne* argued that since the individual officers could not claim the immunity of the Fifth Amendment from the production of the corporate records and papers, the Fourth Amendment likewise did not protect them from an unlawful seizure of corporate records and papers. The Court in *Silverthorne* rejected this contention, stating that rights under the Fourth Amendment *"are to be protected even though the same result might have been achieved in a lawful way"*, 251 U. S. at 392, so that the illegally seized corporate records could not be used against either the corporation or its officers.

As in *Silverthorne,* the state in the present case could have obtained the union records in question by procuring a search warrant or seeking a further order to enforce the subpoena *duces tecum.* The union records could then have been used against the individual officers. The state chose, however, to obtain the records by means of an unlawful search and seizure and, consequently, *Silverthorne* teaches that those illegally seized records cannot be used as evidence in a prosecution against the union officers.

In *Silverthorne* the government was ordered by the District Court to return the illegally seized corporate records. Complying, the government then attempted to obtain the same records by a subpoena directed to Frederick Silverthorne, individually. He refused to produce the corporate records and was subsequently held in contempt. The Court noted that if such a procedure were sanctioned, then the government could, by this simple two-step process, circumvent the mandates of the Fourth Amendment:

> "In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired should not be used before the Court but that it shall not be used at all." 251 U. S. at 392.

Thus, it is clear from *Silverthorne* that the Fourth Amendment prohibits unlawful searches and seizures of corporate papers and that the fruits of such seizures cannot be used in a prosecution against a corporation or a union or its officers.

Since *Silverthorne*, it had often been argued that *Silverthorne* was not intended to prohibit the use of illegally seized evidence against all persons, but only as against those persons who had standing to sue or, in other words, persons whose rights were invaded by the unlawful search. *Silverthorne* clearly established that some individuals could assert Fourth Amendment rights when corporate records were illegally seized. Questions remained, however, concerning which particular individuals had standing to assert these rights. These latter questions were fully explored in and resolved by *Jones*.

Subsequent to *Silverthorne*, *In re Dooley*, 48 F. 2d 121 (2nd Cir. 1931) applauded *Silverthorne* and emphasized, in a carefully reasoned discussion, the right of a corporate officer to employ the Fourth Amendment in a prosecution against him to exclude illegally seized corporate records:

> "Because the corporation and its officers could not claim immunity under the Fifth Amendment from the production of corporate papers, it was contended in the *Silverthorne* Case that the Fourth Amendment likewise did not protect them from an unlawful search for corporate papers and so would not prevent the United States from requiring the production of the corporate papers at the trial. The Supreme Court held that a corporation enjoys the immunities granted

by the Fourth Amendment to the same extent as an individual, and that the subpoena did not lie because *the papers unlawfully seized could not be used as evidence against the corporation or its officers. Such a decision was necessary in order to afford adequate protection to the corporation against an unlawful search and seizure. If corporate property illegally seized could be used in evidence against the officers, there would be little inducement offered to government agents to abstain from raids, seeing that the only real detriment the prosecution would suffer in such circumstances for its unlawful conduct would be the inability to have fines imposed upon a corporate defendant.* The court did no more than hold that, where the search had invaded the rights of all defendants, the papers seized could not be used against any of them, even though the papers called for by the subpoena were only corporate papers." (Emphasis added. 48 F. 2d at 121-122.)

The Court in *Dooley* further noted that the *Silverthorne* case did not go so far as to preclude the use of evidence obtained through an unlawful search and seizure even as against persons whose rights have not been invaded. Therefore, the Court in *Dooley* would not grant an injunction "to protect individuals who are not before the Court, and whose rights, so far as appears, have not been invaded at all".[41]

It is submitted that *Silverthorne, Dooley* and other lower court cases[42] fully support the decision of the Court of

---

[41] 48 F. 2d at 122.

[42] See *United States v. Cooper,* 288 F. 604 (Iowa 1923); *United States v. Birrell,* footnote 30. The Court here held that Birrell, as an individual, had standing to raise the exclusionary rule of the Fourth Amendment to prevent the prosecution from using illegally seized corporate records. The Court also distinguished various Second Circuit cases, to wit: *United States v. Antonelli Fireworks Co.,* 155 F. 2d 631 (2nd Cir. 1946); *United States v. Fago,* 319 F. 2d 791 (2nd Cir. 1963); *Lagow v. United States,* 159 F. 2d 245 (2nd

(Footnote continued on following page)

Appeals. These cases clearly recognize that the exclusionary rule of the Fourth Amendment is available to corporate and union officers to prevent the use of records obtained from illegal searches and seizures.

Although at the time *Silverthorne* was decided, the Fourth Amendment did not apply to the states via the Fourteenth Amendment. The decision in *Mapp* brings the full force of *Silverthorne* to bear upon the states:

> "Since the Fourth Amendment's right of privacy has been declared enforceable against the states through the Due Process Clause of the Fourteenth, it *is enforceable against them by the same sanction of exclusion as is used against the Federal Government.* * * * To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' "[43] (Citing *Elkins v. United States,* 364 U. S. at 217. Emphasis added.)

The decision of the Court of Appeals does not restrict police investigation. It does not preclude the authorities from obtaining books and records in a lawful manner. The Court of Appeals is simply requiring the authorities to proceed according to the minimum standards of the Fourth Amendment. The purpose of the exclusionary rule, to prevent unlawful searches and seizures, requires that the

---

(Footnote continued from preceding page)

Cir. 1946) and *United States v. Guterma,* 272 F. 2d 344 (2nd Cir. 1959) (see also *United States v. DeVasto,* 52 F. 2d 26 [2nd Cir. 1931]), which were treated in the instant case as being of dubious value. 379 F. 2d at 902. It is also submitted that these cases were based on an erroneous application of *Silverthorne* and *Dooley.*

[43] *Mapp v. Ohio,* 367 U. S. at 655-56; see also *Linkletter v. Walker,* 381 U. S. 618.

Fourth Amendment be applied to the states. In cases such as that now before the Court, the same sanction of exclusion that was applied to the federal government in the *Silverthorne* case should also be applied to the State of New York to prevent such actions.

CONCLUSION

For the foregoing reasons, the decision of the Circuit Court of Appeals should be in all respects affirmed.

Dated: Buffalo, New York, April 2, 1968.

Respectfully submitted,

JAMES L. LEKIN,
Attorney for Respondent.

SAPERSTON, WILTSE, DUKE, DAY & WILSON,
of Counsel.

SUPREME COURT OF THE UNITED STATES

No. 844.—October Term, 1967.

Vincent R. Mancusi, Warden, Petitioner, *v.* Frank De Forte.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 17, 1968.]

Mr. Justice Harlan delivered the opinion of the Court.

In 1959 the respondent, Frank De Forte, a vice president of Teamsters Union Local 266, was indicted in Nassau County, New York, on charges of conspiracy, coercion, and extortion, it being alleged that he had misused his union office to "organize" owners of juke boxes and compel them to pay tribute. Prior to the return of the indictment, the Nassau County District Attorney's office issued a subpoena *duces tecum* to Local 266, calling upon it to produce certain books and records. The subpoena was served upon the Union at its offices. When the Union refused to comply, the state officials who had served the subpoena conducted a search and seized union records from an office shared by De Forte and several other union officials. The search and seizure were without a warrant and took place despite the protests of De Forte, who was present in the office at the time. Over De Forte's objection, the seized material was admitted against him at trial. He was convicted.

On direct appeal to the New York courts,[1] De Forte unsuccessfully argued, *inter alia*, that the seized material

[1] Those appeals culminated in a petition for certiorari to this Court, which was denied *sub nom. DeGrandis* v. *New York*, 375 U. S. 868.

was constitutionally inadmissible in state proceedings under the rule laid down in *Mapp* v. *Ohio*, 367 U. S. 643, because the search and seizure occurred without a warrant.[2] De Forte subsequently brought a federal habeas corpus proceeding, in which he made the same contention. The United States District Court for the Western District of New York denied the writ, 261 F. Supp. 579, but on appeal the Court of Appeals for the Second Circuit reversed and directed that the writ issue. 379 F. 2d 897. We granted certiorari, 390 U. S. 903, to consider the State's[3] contention that the Court of Appeals erred in upsetting this state conviction. Concluding that the Court of Appeals was right, we affirm.

I.

It is desirable at the outset to make clear what is and what is not involved in this case. The decision below was based solely upon a finding that De Forte's Fourth and Fourteenth Amendment rights, see *Ker* v. *California*, 374 U. S. 23, 30–34, were violated by the search and seizure, and that the seized material was therefore inadmissible under *Mapp*. It is on this ground alone that De Forte argues for affirmance. Consequently, there is no occasion to consider whether De Forte might successfully have asserted his Fifth Amendment right against self-incrimination with respect to the use against him of the seized records. Cf. *United States* v. *White*, 322 U. S. 694; *Wilson* v. *United States*, 221 U. S. 361. Nor is there any need to inquire whether De Forte could have asserted a Fourth or Fifth Amendment claim on behalf

[2] De Forte's petition for certiorari following direct appeal was denied in 1963, more than a year after the Court's decision in *Mapp* v. *Ohio*. Hence, under the rule laid down in *Linkletter* v. *Walker*, 381 U. S. 618, De Forte is entitled to invoke the exclusionary principle established in *Mapp*. See 381 U. S., at 622 and n. 5.

[3] The petitioner, Mancusi, is warden of the New York State prison in which De Forte is confined.

of the Union, for he did not do so. Moreover, this is not a case in which it is necessary to decide whether the traditional doctrine that Fourth Amendment rights "are personal rights, and . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure," *Simmons* v. *United States*, 390 U. S. 377, at 389, should be modified. Cf. *id.*, at 390, n. 12. For De Forte claims that under the traditional rule he does have standing to challenge the admission against him at trial of union records seized from the office where he worked. The questions for decision, then, are whether De Forte has Fourth Amendment standing to object to the seizure of the records and, if so, whether the search was one prohibited by the Fourth Amendment.

II.

We deal, first, with the question of "standing." The Fourth Amendment guarantees that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The papers which were seized in this case belonged not to De Forte but to the Union. Hence, De Forte can have personal standing only if, as to him, the search violated the "right of the people to be secure in their . . . houses . . . ."[4] This Court has held that

[4] The fact that the seized papers belonged to the Union does not imply of itself that an individual could never have personal standing to object to their admission against him. For example, state officers conceivably might have seized the papers during a search of De Forte's home, and in that event we think it clear that he would have had standing. *Wilson* v. *United States*, 221 U. S. 361, is by no means to the contrary, for in that case there was no physical search at all. The only Fourth Amendment standing question in *Wilson* was whether a corporate officer had personal standing to object to a *subpoena duces tecum* addressed to the corporation, on the ground that it was overbroad. See 221 U. S., at 375–376.

the word "houses," as it appears in the Amendment, is not to be taken literally, and that the protection of the Amendment may extend to commercial premises. See, *e. g., See* v. *Seattle*, 387 U. S. 541; *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385.

Furthermore, the Amendment does not shield only those who have title to the searched premises. It was settled even before our decision in *Jones* v. *United States*, 362 U. S. 257, that one with a possessory interest in the premises might have standing. See, *e. g., Jeffers* v. *United States*, 342 U. S. 48. In *Jones*, even that requirement was loosened, and we held that "anyone legitimately on premises where a search occurs may challenge its legality . . . when its fruits are proposed to be used against him." 362 U. S., at 267.[5] The Court's recent decision in *Katz* v. *United States*, 389 U. S. 347, also makes it clear that capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion. See 389 U. S., at 352.

---

[5] The petitioner contends that this holding was not intended to have general application, but that it was devised solely to solve the particular dilemma presented in *Jones*: that of a defendant who was charged with a possessory offense and consequently might have to concede his guilt in order to establish standing in the usual way. However, this limited reading of *Jones* overlooks the fact that in *Jones* standing was held to exist on two distinct grounds: "(1) [The circumstance that] possession both convicts and confers standing . . . eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized . . . . (2) *Even were this not a prosecution turning on illicit possession*, the legally requisite interest in the premises was here satisfied . . . ." 362 U. S., at 263. (Emphasis added.) Thus, the second branch of the holding, with which we are here concerned, was explicitly stated to be of general effect.

The crucial issue, therefore, is whether, in light of all the circumstances, De Forte's office was such a place.

The record reveals that the office where De Forte worked consisted of one large room, which he shared with several other union officials. The record does not show from what part of the office the records were taken, and De Forte does not claim that it was a part reserved for his exclusive personal use. The parties have stipulated that De Forte spent "a considerable amount of time" in the office, and that he had custody of the papers at the moment of their seizure.[6]

We hold that in these circumstances De Forte had Fourth Amendment standing to object to the admission of the papers at his trial. It has long been settled that one has standing to object to a search of his office, as well as of his home. See, *e. g.*, *Gouled* v. *United States*, 255 U. S. 298; *United States* v. *Lefkowitz*, 285 U. S. 452; *Goldman* v. *United States*, 316 U. S. 129; cf. *Lopez* v. *United States*, 373 U. S. 427; *Osborn* v. *United States*, 385 U. S. 323. Since the Court in *Jones* v. *United States*, *supra*, explicitly did away with the requirement that to establish standing one must show legal possession or ownership of the searched premises, see 362 U. S., at 265–267, it seems clear that if De Forte had occupied a "private" office in the union headquarters, and union records had been seized from a desk or a filing cabinet in that office, he would have had standing. Cf. *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344; *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385. In such a "private" office, De Forte would have been entitled to expect that he would not be disturbed except by personal or business invitees, and that records would not be taken except with his permission or that of his union superiors. It seems to us that the situation was not fundamentally changed

[6] See Joint Appendix 51–52.

Johnson v. *United States*, 333 U. S. 10, 14." *Giordenello* v. *United States*, 357 U. S. 480, 486. In *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, a corporate office was searched for papers which the corporation had refused to deliver in response to a New York District Attorney's subpoena, apparently similar to the one in this case. Speaking for the Court, Mr. Justice Holmes not only held that the seizure of the papers was unjustified but characterized it as "an outrage." *Id.*, at 391. The objections of both the corporation and the officer were sustained. Thus, there can be no doubt that under this Court's past decisions [11] the search of De Forte's office was "unreasonable" within the meaning of the Fourth Amendment.[12]

The judgment of the Court of Appeals is

Affirmed.

---

[11] The Court's opinion in *Davis* v. *United States*, 328 U. S. 582, does contain dicta to the effect that there is a lesser right to privacy when government officials have a "right" to inspect the seized items. See, *e. g.*, *id.*, at 593. However, the only holding in *Davis* was that there had been a valid consent to the search; the case "did not involve a search warrant issue." *See* v. *City of Seattle*, 387 U. S. 541, 545, n. 7.

[12] It is, of course, immaterial that the State might have been able to obtain the same papers by means which did not violate the Fourth Amendment. As Mr. Justice Holmes stated in *Silverthorne Lumber Co.* v. *United States*, *supra*, at 392: "[T]he rights . . . against unlawful search and seizure are to be protected even if the same might have been achieved in a lawful way."

SUPREME COURT OF THE UNITED STATES

No. 844.—October Term, 1967.

Vincent R. Mancusi, Warden, Petitioner, *v.* Frank De Forte.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 17, 1968.]

Mr. Justice Black, with whom Mr. Justice Stewart joins, dissenting.

Until this case was decided just now it has been the law in this country, since the federal Fourth Amendment exclusionary rule was adopted in 1914, that a defendant on trial for a crime has no standing or substantive right to object to the use of papers and documents against him on the ground that those papers, belonging to someone else, had been taken from the owner in violation of the Fourth Amendment. Heretofore successful objection to use of such papers as evidence has been left to the owner whose constitutional rights has been invaded. In *Wilson* v. *United States*, 221 U. S. 361, decided in 1911, this Court in an exhaustive opinion by Mr. Justice Hughes, later Chief Justice, applied that principle by denying the benefit of the Fourth and Fifth Amendments to a corporate officer, even one who had helped to prepare the corporate papers summoned to be produced.[1] In *United States* v. *White*, 322 U. S. 694, decided in 1944, this Court applied the same principle in rejecting a claim of a union

[1] See also *Hale* v. *Henkel*, 201 U. S. 43 (1906); *Grant* v. *United States*, 227 U. S. 74 (1913); *Essgee Co.* v. *United States*, 262 U. S. 151 (1923); *Goldstein* v. *United States*, 316 U. S. 114 (1942); *Davis* v. *United States*, 328 U. S. 582 (1946); *Wong Sun* v. *United States*, 371 U. S. 471 (1963); *Wild* v. *Brewer*, 329 F. 2d 924 (C. A. 9th Cir. 1964).

officer that the use of union papers and documents against him under a subpoena *duces tecum* would incriminate him. And indeed the Court in today creating its new rule is unable to cite a single previous opinion of this Court *holding* to the contrary.

In creating this new rule against the use of papers and documents which speak truthfully for themselves, the Court is putting up new hurdles and barriers bound to save many criminals from conviction. I should not object to this new rule, however, if I thought it was or could be justified by the Fourth or any other constitutional amendment. But I do not think it can. The exclusionary rule itself, even as it applies to the exclusion of the defendant's own property when illegally seized, has had only a precarious tenure in this Court. See *Adams* v. *New York,* 192 U. S. 585 (1904); *Weeks* v. *United States,* 232 U. S. 383 (1914); and my concurring opinion in *Mapp* v. *Ohio,* 367 U. S. 643, 661 (1961). I wish to repeat here what I have indicated before, that this seems to me a rather inopportune time to create a single rule more than the Constitution plainly requires to block conviction of guilty persons by keeping out probably the most reliable kind of evidence that can be offered.

A corporate or union official suffers no personal injury when the business office he occupies as an agent of the corporation or union is invaded and when records he has prepared and safeguarded as an agent are seized. The invasion by the Government may disrupt the functioning of the office, prevent employees from performing their duties, and result in disclosure of business matters the company or union wished to keep secret. But all these are injuries only to the corporation or union as such. The organization has every right to challenge such intrusions whenever they occur—if the seizure is illegal, the records obtained can be suppressed in a prosecution

against the organization, and if no prosecution is initiated, the organization can obtain return of all the documents by bringing a civil action. See, *e. g., Go-Bart Importing Co.* v. *United States,* 282 U. S. 344 (1931). Such intrusions, however, involve absolutely no invasion of the "personal privacy" or security of the agent or employee as an individual, and he accordingly has no right to seek suppression of records that the corporation or union itself has made no effort to regain.

The cases decided by this Court have, until today, uniformly supported this view and rejected the sweeping new exclusionary rule now advanced by the Court. Nor in my judgment does any one of the cases relied on by the Court provide support for its holding. The Court's basic premise is that if the union papers had been taken directly from a desk used by De Forte in a union office used only by him, his standing would have been clear, without regard to any other circumstances. I have found no past decision by this Court to that effect. Neither *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 (1920), nor *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344 (1931), mentions the question of standing at all, and it is hard to see how the Court's inference can be drawn from these cases since in both the party seeking suppression of the documents was in fact the owner of them. Although in *Silverthorne* the objections had been raised by both the corporation and one of its officers, standing was never even mentioned from the beginning to the end of the opinion, and the Court treated both parties as the "owners" of the documents. 251 U. S., at 391. Consequently, the Court's use of Mr. Justice Holmes' reference to "outrage" in no way supports the Court's holding today, directly or indirectly.

Jones v. *United States,* 362 U. S. 257 (1960), also fails to sustain the Court's position. In that case the petitioner had been arrested in a friend's apartment and

was charged with possession of narcotics found there. This Court was troubled about the "dilemma" that would be created by requiring the petitioner, in order to secure suppression of the narcotics, to swear that they were taken from his possession, thus confessing his guilt of the very offense charged against him. To avoid this situation the Court held that petitioner could make his motion to suppress without swearing to possession, either because of the dilemma itself or because as a guest in the apartment he had the "legally requisite interest in the premises." 362 U. S., at 263. The Court today puts great stress on the statement in *Jones* that "anyone legitimately on the premises where a search occurs may challenge its legality . . . when its fruits are proposed to be used against him." 362 U. S., at 267. With deference I must point out that this sweeping dictum is taken somewhat out of context and cannot possibly have the literal meaning attributed to it. It would be quite a hyperbole, I think, to say that the *Jones* opinion suggested that just any person who happened to be in a house against which an unreasonable search was perpetrated could ask to have all evidence obtained by that search excluded from evidence against him. As was asked by the court below, would that dictum enable a janitor to escape the use of evidence illegally seized from his boss? The Court apparently recognizes this problem even now, for De Forte clearly was "legitimately on the premises" and thus his standing should be obvious, under its reading of *Jones*, without the Court's extended discussion of "reasonable expectation" and the related limiting tests. This reasoning in terms of "expectations," however, requires conferring standing without regard to whether the agent happens to be present at the time of the search or not, a rather remarkable consequence of the statement in *Jones*. In fact the Court's opinion indicates to me that the Court is preparing the way to use

Jones to eliminate entirely the requirement for standing to raise a search and seizure question and to permit a search to be challenged at any time, at any place, and under all circumstances, regardless of the defendant's relationship to the person or place searched or to the things seized. Any such step would elevate the Fourth Amendment to a position of importance far above that of any other constitutional provision, compare *Flast* v. *Cohen*, — U. S. — (1968), and would make it more difficult for the Government to convict guilty persons who can make no claim to redress in any form since they suffered no invasion of any kind by the search itself. I would prefer to return to *Jones* itself, where we made quite clear throughout the opinion that while common-law concepts of property ownership were not controlling, standing was not automatically conferred on "anyone legitimately on the premises." We stressed:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." 362 U. S., at 261.

In the present case I think it is entirely clear that the search was not "directed" against De Forte personally, but was addressed to and aimed at the Union and designed to secure from the Union papers belonging to the Union. The search occurred in a large room, which De Forte shared with a number of others, and the records were not taken from files and drawers used exclusively by him for his own private purposes. The police had been investigating a large conspiracy perpetrated through the Union and at the time were primarily interested in getting more information about the operation of the Union.

The records taken were those that had been listed in a subpoena addressed to the Union itself, and since the Union had raised no objection to the subpoena, it was under a duty to turn over the records. Compare *Hale* v. *Henkel*, 201 U. S. 43 (1906).

Undoubtedly, I suppose, even if the Union's papers here should be returned either to the Union or to the defendant, the State could, on a new trial, summon the papers and get them and use them.[2] A rule which encourages such circumlocution as that is hardly the kind of principle to which this great Court should give birth. I disclaim any responsibility whatever for the new rule.

[2] Since the State had obtained a subpoena for these documents even before the search, the new subpoena would not be an invalid "fruit" of the illegal seizure. Compare *Silverthorne*, *supra*.

SUPREME COURT OF THE UNITED STATES

No. 844.—October Term, 1967.

Vincent R. Mancusi, Warden, Petitioner, *v.* Frank De Forte.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 17, 1968.]

Mr. Justice White, dissenting.

Although the Fourth Amendment perhaps protects the individual's private desk in a union office shared with other officers or employees, I dissent from the Court's extension of the protected area to the office door.